United States Court of Appeals
for the
District of Columbia Circuit

TRANSCRIPT OF RECORD

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No. 12,249

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNESSEE NATURAL GAS LINES, INC., *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*

164

CITY OF NASHVILLE, TENNESSEE, RAILROAD AND PUBLIC
UTILITIES COMMISSION OF THE STATE OF
TENNESSEE, *Intervenors*

**Petition for Review of Order of the
Federal Power Commission**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 20 1954

Joseph W. Stewart
CLERK

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INDEX

PAGE

Petition for Review and Stay of Commission Order 2 A

- A. The Nature of the Proceeding as to Which Review is Sought 3 A
- B. The Statutes Upon Which Petition for Review and Stay of Order is Based 6 A
- C. The Points Upon Which Petitioner Intends to Rely 7 A
- D. Necessity for the Immediate Issuance of a Stay Order 8 A
- E. The Relief Prayed 9 A

Exhibit "A" 13 A

Order Providing for the Filing of Just and Reasonable Rates and Charges 13 A

Exhibit "B" 22 A

Order Making Effective Proposed Rate Schedules Upon Filing of Undertaking to Assure Refund of Excess Charges 22 A

Exhibit "C" 26 A

Order Denying Application for Rehearing, Stay of Order, Other Relief and Oral Argument 26 A

Proceedings 27 A

Prepared Testimony of T. Cecil Wray 33 A

Thomas W. Goodloe 36 A
- Direct Examination 37 A
- Cross Examination 53 A

Prepared Testimony of Thomas W. Goodloe 37 A

Tennessee Natural Gas Lines, Inc.—
Comparison of Revenues Under Present, Proposed and Stipulated Rates (1953) 61 A

Tennessee Natural Gas Lines, Inc.—
Balance Sheet 63A, 63A1

Tennessee Natural Gas Line,s Inc.—
Statement of Earned Surplus 63A2

PAGE

Exhibit 7 .... 63A3

Exhibit 9—Tennessee Natural Gas Lines—Allocation of Cost of Service, Demand Commodity Basis (1953) .... 65 A

Exhibit 10—Tennessee Natural Gas Lines, Inc.—Comparison of Resale Cost of Service and Resale Revenues Under Stipulated Rates (1953) (Including and Excluding Tenn. Gross Receipts Tax) .... 66 A

Petition of the Railroad and Public Utilities Comission of the State of Tennessee for Leave to Intervene .... 67 A

Order Permitting Intervention .... 69 A

Order Making Effective Proposed Rate Schedules Upon Filing of Undertaking to Assume Refund of Excess Charges .... 70 A

Order Providing for the Filing of Just and Reasonable Rates and Charges .... 76 A

Application for Rehearing and for Stay of Order and for Other Relief and for Oral Argument .... 84 A

Application for Rehearing and for Stay of Order and for Other Relief and for Oral Argument .... 85 A

Certificate of Service .... 94 A

Order Denying Application for Rehearing, Stay of Order, Other Relief and Oral Argument .... 96 A

Order Extending Time for Filing Rate Schedule .... 97 A

Order Staying the Effect of Order Providing for the Filing of Just and Reasonable Rates and Charges, Providing for the Filing of Substitute Tariff Sheets Subject to an Undertaking and Providing for the Refund of Excess Charges .... 98 A

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UNITED STATES COURT OF APPEALS
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No. 12,249

Tennessee Natural Gas Lines, Inc.

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vs.

Federal Power Commission

Respondent

Petition For Review of Order
of the Federal Power Commission

1 In The
UNITED STATES COURT OF APPEALS
For the District of Columbia

No. ____________

Tennessee Natural Gas Lines, Inc.

Petitioner

vs.

Federal Power Commission

Respondent

PETITION FOR REVIEW AND STAY OF COMMISSION ORDER

Your Petitioner, Tennessee Natural Gas Lines, Inc., being aggrieved and suffering a legal wrong by an order of the Federal Power Commission, hereinafter called the "Commission", dated April 16, 1954, hereby files in this

Court pursuant to Section 19(b) of the Natural Gas Act its petition to this Honorable Court to review such order, and pending final decision by this Court to stay said order, and upon such review to set aside and/or modify it. A true and correct copy of said order of April 16, 1954, is hereto attached, marked Exhibit "A", and by this reference made a part hereof. In support hereof, Petitioner respectfully shows:

A. *The Nature of the Proceeding as to Which Review is Sought.*

On August 31, 1953, Petitioner tendered to the Commission Petitioner's Third Revised Sheets Nos. 4, 6 and 7
to its FPC Gas Tariff, Original Volume No. 1,
2 seeking an increase in its resale rates to its only
resale customer, Nashville Gas Company, all of the
stock of which is owned by Petitioner.

By order issued September 24, 1953, the Commission suspended the proposed Tariff Sheets until March 1, 1954, and ordered a hearing commencing February 15, 1954, concerning the lawfulness of the rates, charges, classifications and services set forth in said Tariffs.

On March 18, 1954, the Commission entered its order making effective said suspended Tariff Sheets as of March 1, 1954, upon the filing of an undertaking and subject to refund with interest of the portion of the increased rates and charges which might not be found to be justified. A true and correct copy of said order is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

Said order of March 18, 1954, among other things, contains the following:

"The Commission *orders*:

• • • •

(B) Tennessee Natural shall refund to those entitled thereto all or the portion of the difference between the increased rates and charges made effective as of March 1, 1954, and those in effect immediately prior thereto, found by the Commission in this proceeding not justified, with interest at the rate of 6% per annum from the date of payment to Tennessee Natural until refunded; etc."

The said order further provided that Tennessee Natural should file with the Commission the necessary undertaking to make refund referred to in paragraph (B) above within 15 days from the issuance of said order. Accordingly, on March 23, 1954, Petitioner did file the required undertaking to make refund with the Commission.

On February 15, 1954, the hearing was convened before the Commission and recesses were permitted from day to day, during which time conferences were held among representatives of Petitioner, the intervenors,—
3 City of Nashville and the Tennessee Railroad and Public Utilities Commission,—and the Commission Staff in order to discuss informally the rate increase in an effort to simplify the issues or reach a settlement satisfactory to all parties.

At an open hearing on February 19, 1954, it was announced that an agreement had been reached as to all issues except whether the Tennessee Gross Receipts Tax should be included in Petitioner's cost of service. Accordingly, it was agreed that alternate rates would be submitted to the Commission reflecting the inclusion and exclusion of the Tennessee Gross Receipts Tax. There was also submitted to the Commission briefs by all parties on the sole question at issue. The Commission Staff offered in evidence Exhibit No. 10, which was received and which was titled "Comparison of Resale Cost of Service and Resale Revenues Under Stipulated Rates (1953) (Including and Excluding Tenn. Gross Receipts Tax). The figures in the left hand column of said Exhibit are under the heading, "Excluding Tenn. Gross Receipts Tax" and the figures in the right hand column are under the heading "Including Tenn. Gross Receipts Tax." The following is copied from this exhibit:

"Stipulated Rate

Demand Charge

First 36,800 mcf per month of billing demand, $ per mcf	$2.16	$2.20
All excess mcf per month of billing demand	$1.80	$1.82

Commodity Charge

¢ per mcf	15.4¢	15.6¢"

By its order of April 16, 1954 (Exhibit A), the Commission excluded from Petitioner's cost of service the
Tennessee Gross Receipts Tax and ordered that the
4 stipulated rates in the left hand column quoted
above should take effect within 30 days from the
issuance of the order.

On May 12, 1954, Petitioner filed with the Commission an Application for Rehearing for Stay of the Commission Order and for Oral Argument. On the same date Petitioner, by telegram, requested an extension of time of an additional 30 days within which to file its Gas Tariffs pursuant to the order of the Commission, as aforesaid.

On May 13, 1954, the Commission issued its "Notice of Extension of Time" under the terms of which Petitioner was given an extension of time to and including June 1, 1954, within which it shall file its Revised General Service Rate Schedule G-1 in a form satisfactory to the Commission, as required by the order issued April 16, 1954 (Exhibit A).

On May 27, 1954, the Commission issued its order denying the Petition to Rehear, denying the requested Stay of the Order and denying Oral Argument. A true and correct copy of said order of May 27, 1954, is hereto attached, marked Exhibit "C", and by this reference made a part hereof.

B. *The Statutes Upon Which Petition for Review and Stay of Order is Based.*

The applicable statutes authorizing this Honorable Court to hear and decide this petition for review and stay of the Commission's order are:

Section 19(b) of the Natural Gas Act of June 21, 1938 (Title 15, USC, Section 717r), which reads in part as follows:

> "(b) Any party to a proceeding under this Chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit where the Natural Gas Company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty (60) days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part." * * *

5 > "(c) * * * The Commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

Section 10(a) of the Administrative Procedure Act of June 11, 1946 (Title 5, USC, Section 1009) reading as follows:

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

As hereinbefore set forth, Petitioner duly filed on May 12, 1954, its petition for rehearing and stay of the Commission's order of April 16, 1954. This application for rehearing and stay of said order was denied by the Commission's order of May 27, 1954. This Petition for Review is being filed within sixty (60) days following May 27, 1954.

C. *The Points Upon Which Petitioner Intends to Rely.*

The Tennessee Gross Receipts Tax is found at Section 1248.126 of Williams Code of Tennessee, as amended. The portions of the statute pertinent to this proceeding are as follows:

"1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the state for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half per cent (1½%) of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.

This tax shall not apply to cities or other political subdivisions of the state owning and operating gas companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.

6 It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.

There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise Tax Law during the calendar year in which the tax hereby levied becomes due."

Petitioner has been paying this tax to the State of Tennessee, as demanded by the taxing officials, since the year 1948. It will again be required to pay the tax when it falls due on August 1, 1954. The tax now amounts to approximately $40,000.00 a year.

Petitioner has not paid this tax voluntarily, but through compulsion and to avoid a levy by the State of Tennessee on its property. When the matter of Petitioner's liability for the tax first arose, it took the position that it was not liable for the tax. The Attorney General of the state ruled to the contrary, and, accordingly, the tax was paid under compulsion. The written opinion of the Attorney General holding Petitioner liable for the tax was filed as a part of the record in the hearing before the Commission.

Petitioner intends to rely upon the following points:

(1) The Commission erred in excluding from Petitioner's cost of service the amount of money which Petitioner is required to pay to the State of Tennessee in the form of the Tennessee Gross Receipts Tax.

(2) The Commission erred in holding on page 3 of its order (Exhibit A) as follows:

". . . Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued Tennessee Natural that:

7 '(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost for transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.

'(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1), above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned.' *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129) (1945)."

Petitioner charges that this is error because the restrictions imposed upon the certificate granted Tennessee Natural in Docket No. G-575 (4 F.P.C. 1127, 1129), quoted above, violate the provisions of the Natural Gas Act. The exclusion of any legitimate item of expense from Petitioner's cost of service deprives Petitioner of the right to rates which are "just and reasonable" and which do not yield to it a fair rate of return on its investment.

(3) The Commission erred in fixing rates for Petitioner which yield it a return on its investment of only 3.2%. Particularly is this true when the record before the Commission shows that Petitioner's outstanding mortgage bonds bear interest at 3.25% and its debentures carry interest at 4.50%. With such an interest cost, a 3.2% return on the entire investment means a return of less than 3% on the book value of the Company's common stock equity, which return is clearly confiscatory.

The Commission's order of April 16, 1954 (Exhibit A) constitutes a violation of the Natural Gas Act, a denial of due process of law, a confiscation of the property
8 rights of Petitioner, and denies the equal protection of the laws, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

D. *Necessity for the Immediate Issuance of a Stay Order.*

Under the terms of the Commission's order of April 16, 1954 (Exhibit A), as modified by the Notice of Extension of Time dated May 13, 1954, Petitioner will be required on June 1, 1954, to file with the Commission its Revised General Service Rate Schedule G-1. As heretofore stated, under such rate schedules Petitioner will only earn 3.2% on its investment.

The Commission did not deny Petitioner's Application to Rehear until May 27, 1954. During the late afternoon of May 27, 1954, Petitioner's counsel received from the Commission telegraphic notice that its Petition to Rehear for Stay of Order and for Oral Argument had been denied. A copy of the order was not received by Petitioner or its counsel until May 29, 1954. Petitioner has given telegraphic notice to the Respondent and to the intervenors in the proceeding before the Commission that it will on June 1, 1954, apply to this Honorable Court for a stay of the order; but time has not permitted service upon the parties of a copy of this Petition to Review this day filed. Unless said order is stayed, immediate and irreparable injury, loss or damage will result to the Petitioner because the Revised Rate Schedules which the Petitioner has been ordered by the Commission to file on June 1, 1954, will immediately take effect and will remain in effect throughout the progress of this proceeding and until this Honorable Court grants the relief herein prayed. It results, therefore, that throughout the period of this litigation, Petitioner will not be able to charge just and reasonable rates and will not be able to earn that fair rate of return which is contemplated by the Natural Gas Act.

9 In the event this Honorable Court sees fit to grant the Application for Stay of the Commission Order, herein prayed, Petitioner will, if required by the Court, either (1) pay into the registry of the court all amounts collected by it from its resale customer in excess of the rates ordered by the Commission in its order of April 16, 1954, or (2) give bond to refund to its resale customer any portion of the amounts collected from it under the rates now in effect which may be found to be unjust or unreasonable.

E. *The Relief Prayed.*

WHEREFORE, Petitioner prays that a copy of this Petition be forthwith served upon some member of the Respondent Federal Power Commission, pursuant to Section 19(b) of the Natural Gas Act; that Respondent be required, in conformity with said Act, to certify and file with the Court the transcript of the record upon which the orders now sought to be reviewed were entered, and that this Court review said proceedings and (1) modify the order of the Commission dated April 16, 1954, by permitting Petitioner to include in its cost of service the Tennessee Gross Receipts Tax which it is required to pay, which will result in the stipulated rate going to effect as follows:

"Stipulated Rate	
Demand Charge	
First 36,800 mcf per month of billing demand, $ per mcf	$2.20
All excess mcf per month of billing demand	$1.82
Commodity Charge	
¢ per mcf	15.6¢"

thereby permitting Petitioner to earn upon its investment that fair rate of return contemplated by the Natural Gas Act, and (2) that pending final determination of these matters the Court stay the order of the Commission, so that it will not be required to file on June 1, 1954, the rates ordered by the Commission in its said order of April 16, 1954, until a final determination of this proceeding.

Respectfully submitted
TENNESSEE NATURAL GAS LINES, INC.

By /s/ Phil B. Whitaker
Phil B. Whitaker
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Attorney for Petitioner

WHITAKER, HALL & HAYNES
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Of Counsel

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

Personally appeared before me the undersigned authority, Thomas W. Goodloe, who makes oath that he is President of Tennessee Natural Gas Lines, Inc., the Petitioner in this proceeding, and that the facts stated in the foregoing Petition are true to the best of his knowledge, information and belief.

/s/ Thomas W. Goodloe
Thomas W. Goodloe

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 28th day of May, 1954.

/s/ Charles W. Fisk, Jr.
Notary Public

My Commission Expires: Feb. 24, 1957.

EXHIBIT "A"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Providing for the Filing of Just and Reasonable Rates and Charges

This is a rate proceeding arising from a rate increase filed by Tennessee Natural Gas Lines, Inc. (Tennessee Natural). The record herein has been certified to us for determination of a single issue, that of whether the Tennessee Gross Receipts Tax should be included in Tennessee Natural's cost of service, and for approval of a proposed settlement as it affects all other issues of the proceedings. Upon consideration of the record, we determine that the Tennessee Gross Receipts Tax should be excluded from Tennessee Natural's cost of service, provide for the filing of rates and charges which were agreed would properly reflect the exclusion of the Gross Receipts Tax, and approve the terms and conditions of the proposed settlement, as hereinafter set forth.

On August 31, 1953, Tennessee Natural filed Third Revised Sheet Nos. 4, 6 and 7 to its FPC Gas Tariff, Original Volume No. 1, providing for an increase of $226,683 annually, or 11.1% to its affiliate and only resale customer, Nashville Gas Company (Nashville Gas), based on sales for the year ended June 30, 1953.

On September 24, 1953, pending a hearing and our decision upon the question of the lawfulness of the rates proposed by Tennessee Natural, we issued an order suspending the proposed tariff sheets until March 1, 1954, and until such further time thereafter as the proposed tariff sheets might be made effective in the manner prescribed by the Natural Gas Act. By the same order we fixed February 15, 1954, as the date for commencement of hearings in the docket.

By order issued March 18, 1954, the suspended tariff sheets were permitted to become effective as of March 1, 1954, upon the filing of an undertaking and subject to refund, with interest, of the portion of the increased rates and charges which we might find not justified.

Following the convening of the hearings recesses were permitted from day to day during which time conferences were held among representatives of Tennessee Natural, the intervenors, City of Nashville, Tennessee and the

Railroad and Public Utilities Commission of Tennessee, and the Staff in order to discuss informally the proposed rate increase in an effort to simplify the issues or reach a settlement satisfactory to all parties. At open hearing on February 19, 1954, it was announced that agreement had been reached as to all issues except whether the Tennessee Gross Receipts Tax should be included in the cost of service. Accordingly, it was agreed that alternate rates would be submitted to us reflecting the inclusion and exclusion of the Tennessee Gross Receipts Tax. Also submitted were briefs of the parties on the question at issue.

2 Section 1248.126 of Williams' Tennessee Code Annotated, 1934 Edition, which provides for the Gross Receipts Tax reads as follows:

"1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the State for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half per cent (1½%) of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.

This tax shall not apply to cities or other political subdivisions of the state owning and operating gas companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.

It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.

There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise Tax Law during the calendar year in which the tax hereby levied becomes due."

Since 1947, Tennessee Natural has been paying the Tax on revenues from all sales of the natural gas it transports and sells in interstate commerce. Principal among such sales are those for resale to its wholly owned subsidiary, Nashville Gas. Additionally, the Tax has been paid by Nashville Gas on the receipts from sales Nashville Gas makes in the course of distributing gas in the City of Nashville. Although Tennessee Natural took the position that it was not liable for the Tax in correspondence with the Office of the Attorney General of the State of Tennessee and in subsequent conferences, it has never contested payment of the Tax in the courts.

From our study of the situation, two conclusions seem abundantly clear. First, there is serious question of the liability of Tennessee Natural for the payment of the Gross Receipts Tax, and Tennessee Natural has been remiss in failing to contest the matter in the appropriate courts. Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued

Tennessee Natural that:

3 "(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.

"(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1) above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned." *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129 (1945)).

To permit the Tax to be included in Tennessee Natural's cost of service would impose on gas consumers in the City of Nashville an added tax and duplicate cost resulting solely from the ownership and operation of the pipe line by a separate corporate entity. As at the time of the Docket No. G-575 proceeding, we find that this is contrary to the public interest. Accordingly, the Gross Receipts Tax must be eliminated in determining Tennessee Natural's cost of service.

Tennessee Natural's net investment rate base as computed by the Staff for the year 1953 was $1,140,956. Allowing a 6% rate of return upon this rate base, and eliminating the $38,914 net effect of the Tennessee Gross Receipts Tax, the overall total cost of service is $2.889,-040, of which $2,261,228 is allocable to jurisdictional sales.

The rate alternate which reflects the exclusion of the Tennessee Gross Receipts Tax is as follows:

Type of Service	Rate Schedule	Demand Charge Per Mcf	Commodity Charge Per Mcf
General Service	G-1	$2.16 for the first 36,800 Mcf of Billing Demand $1.80 for all Excess Mcf per Month of Billing Demand	15.4 cents

These rates would produce revenues of approximately $2,265,000 for the test year.

The Commission *finds*:

(1) The Tennessee Gross Receipts Tax is not a proper item for inclusion in Tennessee Natural's cost of service.

4 (2) Tennessee Natural's just and reasonable rates and charges are those agreed upon by parties to these proceedings as properly reflecting the exclusion of the Tennessee Gross Receipts Tax from Tennessee Natural's cost of service, and subject to the terms and conditions hereinafter ordered, it is appropriate and in the public interest in carrying out the provisions of the Natural Gas Act that such rates and charges should be approved and made effective as hereinafter provided and ordered.

(3) The public interest requires that the following terms and conditions shall attach to this order:

(a) Tennessee Natural shall refund to Nashville Gas the difference between the amounts collected under the rates in effect subject to an undertaking and the amounts which would have been collected by the application of the rates and charges provided for herein, to the billing units which accrued during the period in which rates were collected subject to an undertaking plus interest at a rate of six per cent per annum computed to the date of refund.

(b) In the event that the actual Federal income tax, payable by Tennessee Natural, is fixed at less than the rate of 52 per cent after December 31, 1953, Tennessee Natural shall file revised rate schedules within 30 days, which will reflect such decrease. In such revised rate schedules, the demand charge of the first block shall be reduced by 0.1 cent per Mcf for each 1 per cent of reduction in the Federal income tax rate below 52 per cent. Additionally, Tennessee Natural shall make appropriate refunds from revenues collected under the rates and charges provided for in this proceeding, or as may become final in any court review or otherwise.

(c) Any increase in the cost of natural gas purchased by Tennessee Natural from its supplier, Tennessee Gas Transmission Company (TGT), above the rates of $1.80 per Mcf of billing demand per month and a commodity charge of 15.35 cents per Mcf (at 15.025 psia), which may be made effective by TGT before December 31, 1954 for deliveries to Tennessee Natural, may be passed on by Tennessee Natural upon the following conditions:

(i) Tennessee Natural may file revised tariff sheets with the Commission reflecting an identical increase in the demand component of its then effective rate as that proposed by TGT and/or an identical increase in the commodity component of its then effective rate as that proposed by TGT together with such other revised sheets to Tennessee Natural's then effective FPC Gas Tariff as would necessarily change as a result of an increase in the demand and/or commodity charges.

5 (ii) The revised tariff sheets of Tennessee Natural will bear the same proposed effective date as that proposed by TGT.

(iii) Requirements of Section 154.63(b)(iii) of the Commission's Rules and Regulations shall be satisfied by including in the rate increase a filing reference to the cost data submitted in this proceeding.

(iv) The increase in rates as proposed by Tennessee Natural will follow the same procedural route as the filing of Tennessee Gas Transmission, TGT; that is, suspension dates, bond dates and effective dates.

(v) The filing by Tennessee Natural will be revised to reflect only the increase, if any, which may be in order by the Commission in any final order which is put into effect by TGT resulting from the proceedings relating to the proposed increase which may become final in any court review or otherwise. In this event, Tennessee Natural will file revised tariff sheets to reflect the identical increase in the demand and commodity components as described in (i) above.

(d) If as a result of any order entered by the Commission in the matter of Tennessee Gas Transmission Company, Docket Nos. G-2052 and G-2252, Tennessee Natural's supplier, TGT, shall file revieed rate schedules which are made effective and result in any reduction on or after March 1, 1954, in the rate of $1.80 per each Mcf of billing demand per month and the commodity charge of 15,35 cents per Mcf (at 15.025 psia), Tennessee Natural shall file with the Commission, within 30 days, changes in its rate schedule to reduce its rates identically to the reduction in the demand and/or commodity components reflected in the rates of TGT, and to be effective on the same date as the revised and reduced rates of TGT become effective.

If, as the result of any Commission order entered in the aforesaid proceeding in Docket Nos. G-2052 and/or G-2252, TGT shall make any refunds to Tennessee Natural, then Tennessee Natural shall refund, within 30 days after the receipt thereof, such portion as relates to its sales to its jurisdictional customer after March 1, 1954.

(e) If the rates of TGT are increased solely for the purpose of recouping a production or gathering tax which might be enacted by the State of Texas as a substitute for the invalidated gathering tax, provided that the increase requested by TGT does not exceed 0.35 cents per Mcf, and such increase is passed on to Tennessee Natural, then Tennessee Natural will be permitted to pass on such increase to its jurisdictional customer. If any such tax is invalidated and Tennessee Natural, as a result of such invalidation, receives a refund from TGT, then Tennessee Natural shall pass on to its jurisdictional customer within 30 days such portion of the refund as relates to the sales to the jurisdictional customer.

6 The Commission *orders*:

(A) Tennessee Natural shall, within thirty (30) days after the date of issuance of this order, file a revised General Service Rate Schedule G-1, in a form satisfactory to the Commission, superseding the afore-mentioned Third Revised Sheet Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1. Such General Service Rate Schedule G-1 shall contain a rate consisting of a demand charge of $2.16 per MCF for the first 36,800 Mcf of billing demand per month and $1.80 per Mcf for all excess Mcf of billing demand per month above the first 36,800 Mcf per month, and a commodity charge of 15.4 cents per Mcf of gas delivered.

(B) Within ten (10) days of the issuance of the Commission's order accepting for filing the revised General Rate Schedule G-1 described in (A) above, Tennessee Natural shall submit the details of its calculations reflecting the refund ordered pursuant to Finding (2)(a) and copies of a release from Nashville Gas with respect to such refund.

(C) This order is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Tennessee Natural.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: April 14, 1954

Issued: April 16, 1954

EXHIBIT "B"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Making Effective Proposed Rate Schedules Upon Filing of Undertaking to Assure Refund of Excess Charges

Tennessee Natural Gas Lines, Inc. (Tennessee Natural), on August 31, 1953, filed with the Commission Third Revised Sheets Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, whereby it proposed an increase in the rates and charges to its interstate wholesale customer, Nashville Gas Company.

Pending hearing and the Commission's decision upon the question of the lawfulness of the rates proposed by Tennessee Natural, the Commission, on September 24, 1953, issued an order suspending the aforementioned proposed tariff sheets until March 1, 1954, and until such further time thereafter as such proposed tariff sheets might be made effective in the manner prescribed by the Natural Gas Act.

Hearings were commenced on February 15, 1954, and concluded February 19, 1954, pursuant to the Commission's September 24, 1953 order. A decision has not yet been rendered thereon.

On February 24, 1954, Tennessee Natural filed a motion requesting that Third Revised Sheets Nos. 4, 6 and 7 to its FPC Gas Tariff, Original Volume No. 1, be permitted to go into effect as of March 1, 1954. An answer objecting to such motion and requesting a hearing thereon was filed on February 26, 1954, jointly by the Railroad and Public Utilities Commission of the State of Tennessee and the City of Nashville.

Section 4(e) of the Natural Gas Act provides that whenever a new rate schedule is filed, the Commission shall have authority to enter upon a hearing concerning the lawfulness of the same; and that pending such hearing and the decision thereon, the Commission may suspend the operation of the new rate schedule, "but not for a longer period than five months beyond the time when it would otherwise go into effect." Said section further provides:

"If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or

charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond,
to be approved by the Commission, to refund any
2 amounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

The Commission *finds*:

(1) Good cause has not been shown for providing a hearing on the motion of Tennessee Natural filed on February 24, 1954.

(2) It is appropriate in carrying out the provisions of the Natural Gas Act to prescribe terms and conditions with respect to refunds by Tennessee Natural as hereinafter provided.

The Commission *orders*:

(A) Upon the execution by Tennessee Natural of the agreement and undertaking described in (C) below and acceptance thereof, evidenced by letter addressed to Tennessee Natural by the Secretary of the Commission, the rates, charges, and classifications set forth in the aforesaid Third Revised Sheets Nos. 4, 6, and 7 to Tennessee Natural's FPC Gas Tariff, Original Volume No. 1, shall be effective as of March 1, 1954, subject to further orders of the Commission in this proceeding.

(B) Tennessee Natural shall refund to those entitled thereto all or the portion of the difference between the increased rates and charges made effective as of March 1, 1954, and those in effect immediately prior thereto, found by the Commission in this proceeding not justified, with interest at the rate of 6% per annum from the date of payment to Tennessee Natural until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of the increased rates or charges effective as of March 1, 1954, for each billing period, specifying by whom and in whose behalf such acounts were paid, and shall report in writing and under oath to the Commission monthly for each billing period and for each purchaser the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom, as computed under the rates in effect immediately prior to March 1, 1954, and under the rates allowed by this order to become effective, together with the difference in the revenues so computed.

(C) As a condition of this order, within 15 days from the date of issuance of this order, Tennessee Natural shall execute and file with the Secretary of this Commission its written agreement and undertaking to comply with the terms and conditions of paragraph (B) hereof, signed by a responsible officer of the corporation, evidenced by proper authority from the board of directors, as follows:

3 "In conformity with the requirements of the order adopted ...., in Docket No. G-2255, Tennessee Natural Gas Lines, Inc., hereby agrees and undertakes to comply with the terms and conditions of paragraph (B) of said order and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto, this .... day of ...., 1954.

Tennessee Natural Gas Lines, Inc.

By..

President

Attest:

Secretary"

(D) If Tennessee Natural shall, in conformity with the terms and conditions of paragraph (B) of this order, make the refunds as may be required by order of the Commission, the undertaking shall be discharged, otherwise it shall remain in full force and effect.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: March 17, 1954
Issued: March 18, 1954

EXHIBIT "C"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Denying Application for Rehearing, Stay of Order Other Relief and Oral Argument

On May 12, 1954, Tennessee Natural Gas Lines, Inc. filed an application for rehearing, stay of order, other relief and oral argument with respect to the Commission's order issued April 16, 1954 in this proceeding.

The Commission *finds*:

The application of Tennessee Natural Gas Lines, Inc. filed May 12, 1954 has presented or alleged no new facts and has set forth no new principles of law which either were not fully considered by the Commission before it adopted its order issued April 16, 1954, herein, or having now been considered, warrant any modification or change in said order.

The Commission *orders*:

The application for rehearing, stay of order, other relief and oral argument filed by Tennessee Natural Gas Lines, Inc. on May 12, 1954 in this proceeding be and the same is hereby denied.

By the Commission.

Leon M. Fuquay,
Secretary

Adopted: May 26, 1954
Issued: May 27, 1954

25 *Proceedings*

PRESIDING EXAMINER: I call to order the hearing in the matter of Tennessee Natural Gas Lines Inc., Docket No. G-2255.

This rate proceeding arose from rate increases filed by Tennessee Natural, and the matter came on for hearing on February 15, 1954, pursuant to the Commission's order issued September 24, 1953. No evidence has as yet been offered, the hearing having been recessed from time to time pursuant to the request of all parties, to permit the parties to confer respecting the possibility of agreement or simplification of the issues involved.

As I understand from staff counsel's statement at page 23 of the transcript, agreement has been reached as to all aspects of this case except with respect to the gross receipts tax which is to be resolved by the Commission on the basis of the evidence to be offered today.

Is my understanding correct?

MR. FLAX: That is correct, Mr. Examiner.

* * * *

27 MR. WHITAKER: If I may say a word, Mr. Examiner—it seems to me that a more orderly presentation of the matter would be to read into the record first the stipulation which has been agreed upon; then the evidence which the company will offer and the exhibits which the staff will put in merely represent the basis on which the agreement reflected by the stipulation was reached.

PRESIDING EXAMINER: I would think so. You do not intend offering, I take it, evidence as to the matters upon which agreement has been reached.

MR. WHITAKER: We simply file our exhibits with prepared testimony which all parties have had for some weeks, which is the factual data from the company's standpoint on which the Commission and from which the Commission has made the studies which are reflected by the exhibits which it will file, and all of which explains to the Commission the factual basis from which the stipulation or by which the stipulation was agreed upon by the parties.

* * * *

28 PRESIDING EXAMINER: Then you may proceed, Mr. Flax.

MR. FLAX: In the conferences which preceded this session, agreement was reached by the parties as to all the issues with the exception of one, that of the treatment of the Tennessee gross receipts tax as provided in Section 1246.126(g) of Williams Tennessee Code as amended. Accordingly, it has been decided that there should be submitted to the Commission a summary of costs of service and rates derived therefrom reflecting alternatively the inclusion and the exclusion of the Tennessee gross receipts tax.

It was also agreed that evidence would be presented as to the Tennessee gross receipts tax at the hearing and arguments of the various parties as to its treatment would be submitted to the Commission on briefs.

MR. WHITAKER: May I interrupt just a
29 moment. What was the section number which
you gave?

MR. FLAX: 1248.126(g).

MR. WHITAKER: May I check that just a moment. Yes— 1248.126.

MR. FLAX: Yes, sir. It is Item G of that.

MR. WHITAKER: I don't recall that.

MR. TRIMBLE: That is right.

MR. FLAX: We have exhibits prepared which will show the alternative costs of service and the rates. They will be presented later in the proceeding.

It should be noted in connection with these exhibits that the cost of gas purchased is computed from agreed-upon rates submitted to the Commission but not yet acted upon in the rate proceeding of Tennessee Gas Transmission Company, Docket No. G-2252.

Further terms of the proposed settlement are as follows:

In the event that the actual Federal income tax payable by Tennessee Natural is fixed at less than the rate of 52 percent after December 31, 1953, Tennessee Natural shall file revised rate schedules within 30 days which will reflect such decrease.

In such revised rate schedules, the demand charge of the first block shall be reduced by 0.1 cents per mcf for each 1 percent of reduction in the Federal income tax rate below 52 percent.

Tennessee Natural also agrees to make appro-
30 priate refunds from revenues collected under the
agreed rates as ultimately determined by the Commission in this proceeding or as may become final in any court review or otherwise.

(2) Any increase in the cost of natural gas purchased by Tennessee Natural from its supplier, Tennessee Gas Transmission Company, which will be referred to hereinafter as TGT, above the rates of $1.80 per mcf of billing demand per month and a commodity charge of 15.35 cents per mcf (at 15.025 psia) which may be made effective by TGT before December 31, 1954, for deliveries to Tennessee Natural, may be passed on by Tennessee Natural upon the following terms and conditions.

(A) Tennessee Natural may file revised tariff sheets with the Commission reflecting an identical increase in the demand component of its then effective rate as that proposed by TGT and/or an identical increase in the commodity component of its then effective rate as that proposed by TGT together with such other revised sheets to Tennessee Natural's then effective FPC gas tariff as would necessarily change as a result of an increase in the demand and/or commodity charges; provided, however, that such increase may include an allowance for the Tennessee gross receipts tax in the event that the Commission finds that such tax shall be included in the cost of service.

(B) The revised tariff sheets of Tennessee Natural will bear the same proposed effective date as that proposed by TGT.

31 (C) Requirements of Section 154.63(b)(iii) of the Commission's Rules and Regulations shall be satisfied by including in the rate increase a filing reference to the cost data submitted in this proceeding.

(D) The increase in rates as proposed by Tennessee Natural will follow the same procedural route as the filing of Tennessee Gas Transmission, TGT; that is, suspension dates, bond dates and effective dates.

(E) The filing by Tennessee Natural will be revised to reflect only the increase, if any, which may be in order by the Commission in any final order which is put into effect by TGT resulting from the proceedings relating to the proposed increase which may become final in any court review or otherwise. In this event, Tennessee Natural will file revised tariff sheets to reflect the identical increase in the demand and commodity components as described in (A) above.

(3) If as a result of any order entered by the Commission in the matter of Tennessee Gas Transmission Company, Docket Nos. G-2052 and G-2252, Tennessee Natural's supplier, TGT, shall file revised rate schedules which are made effective and result in any reduction on or after March 1, 1954, in the rate of $1.80 per each mcf of billing demand per month and the commodity charge of 15.35 cents per mcf (at 15.025 psia), Tennessee Natural shall file with the Commission, within 30 days, changes
in its rate schedule to reduce its rates identically
32 to the reduction in the demand and/or commodity
components reflected in the rates of TGT, and to
be effective on the same date as the revised and reduced rates of TGT become effective.

If, as the result of any Commission order entered in the aforesaid proceeding in Docket Nos. G-2052 and/or G-2252, TGT shall make any refunds to Tennessee Natural, then Tennessee Natural shall refund such portion as relates to its sales to its jurisdictional customer within 30 days after the receipt thereof.

(4) If the rates of TGT are increased solely for the purpose of recouping a production or gathering tax which might be enacted by the State of Texas as a substitute for the invalidated gathering tax, provided that the increase requested by TGT does not exceed 0.35 cents per mcf, and such increase is passed on to Tennessee Natu-

ral, then Tennessee Natural will be permitted to pass on such increase to its jurisdictional customer. If any such tax is invalidated and Tennessee Natural, as a result of such invalidation, receives a refund from TGT, then Tennessee Natural shall pass on to its jurisdictional customer such portion of the refund as relates to the sales to the jurisdictional customer.

(5) The agreement reached by the parties and set forth at this time is expressly conditioned upon the Commission's acceptance of all the terms and conditions hereof.

(6) By making this agreement, neither the Com-
33 mission's staff, Tennessee Natural, the Railroad
and Public Utilities Commission of Tennessee, the City of Nashville, or any affected person is to be considered as agreeing with the methods of cost of service determination, of allocation, or with any principles underlying or supposed to underlie the methods of cost of service determination or allocation which have been used in arriving at the rates herein agreed upon. And neither the Commission's staff, Tennessee Natural, the Railroad and Public Utilities Commission of Tennessee, the City of Nashville nor any affected person is to be prejudiced or bound thereby in any future proceeding or proceedings.

PRESIDING EXAMINER: As shown on pages 8 and 9 of the transcript, the parties to this proceeding are, first, Tennessee Natural Gas Lines, Inc.; second, the Railroad and Public Utilities Commission of the State of Tennessee; third, the City of Nashville, Tennessee; and fourth, the staff of the Federal Power Commission. The City of Nashville and the Railroad and Public Utilities Commission are both represented by Mr. Trimble.

It is desirable that counsel state on the record at this time whether or not they are in agreement with the proposed settlement as just outlined by staff counsel.

MR. TRIMBLE: May it please the Examiner, with

one additional change suggested by the intervenors, and
as a result of a conference as to the point in ques-
34 tion, we will be in agreement. There is one addi-
tional change to be made that all parties have
agreed to. And then there is one question that is being
looked into. The intervenors insist on one of the changes.

MR. FLAX: Mr. Examiner, could we pass this point until a subsequent portion of the proceedings.

PRESIDING EXAMINER: Yes. Then, Mr. Whitaker, are you prepared at this time to proceed—

MR. WHITAKER: With one exception, which is now being checked, Mr. Examiner.

• • • •

38 MR. WHITAKER: Mr. Examiner, I would like
39 to now state on the record that the prepared testi-
mony offered by the three witnesses is offered only
in explanation of the company exhibits which have been
marked for identification as Exhibits 1 to 7 inclusive.

PRESIDING EXAMINER: The coopy of the prepared testimony which the Examiner has before him appears to include the testimony of J. C. Schutt, Thomas W. Goodloe and T. Cecil Wray, and that is the testimony to which you refer.

MR. WHITAKER: Yes, sir, that is the prepared testimony to which I refer. Now, Mr. Goodloe, in addition to his prepared testimony, will testify about another matter which has not yet been determined, which will be submitted to the Commission.

• • • •

52 *Prepared Testimony of T. Cecil Wray*

• • • •

55 Exhibit 7 is a map of the Tennessee Natural
system. This map shows the route, size and
length of the various mains. Also shown are the loca-

tions of all valves, regulators and delivery points.

The system was constructed in two parts. In 1946 an 8″ line was built from the Tennessee Gas Transmission Company main, at the point designated "Westernia" southeastwardly a distance of 13.91 miles to the point designated Bordeaux, at which point a city gate metering station was constructed and connection made to the facilities of the Nashville Gas Company.

In 1950, additional construction was planned to serve four purposes as follows:

56 1. Increase capacity. The capacity of the original line had been reached; in fact as soon as its new line was placed in service very cold weather occurred and if the line had not been in service, the Nashville Gas Company would have been forced to fully curtail a great quantity of firm load.

2. To permit the Nashville Gas Company system to be supplied from two points instead of one. Due to the way the Cumberland River bisects the city, the second delivery point increased the assurance of continuity of supply.

3. To supply gas to the Nashville Gas Company at the three towns of Madison, Rayon City and Old Hickory, thus enabling these communities to receive gas service.

4. To supply gas to the Du Pont Company's Old Hickory Rayon Plant.

To accomplish the above purposes, the following construction was done in 1950. A 10″ line was extended from the Westernia tap southeastwardly along the original 8″ line for a distance of 8.48 miles. At this point, connection was made to the original line and an 8″ line extended east to Old Hickory, Tennessee, a distance of 11.43 miles. At the terminus, metering stations were constructed to supply gas to the Du Pont Company and to the Nashville Gas Company. At two points somewhat west of the terminus, metering stations were constructed to supply gas to the Nashville Gas Company for resale in the towns of Madison and Rayon City.

57 From this east-west 8″ line, a lateral 8″ line was extended south a distance of 4.53 miles to the point designated "Trinity," at which point a city gate station was constructed and connection made to the Nashville Gas Company facilities. At all of the metering stations Tennessee Natural not only meters the gas but varies the pressure as required by the Nashville Gas Company.

A preliminary study of load indicates additional facilities may be required by Tennessee Natural Gas Lines to meet the demand of Nashville Gas Company in the next year or so.

MR. WHITAKER: That is all of Mr. Wray.

PRESIDING EXAMINER: There being no cross-examination—

MR. TRIMBLE: Mr. Examiner, I would like to make a statement, in so far as the intervenors are concerned. Now, we will not cross-examine Mr. Wray nor Mr. Schutt nor Mr. Goodloe on the matters that are now being presented, upon, and only upon, the understanding and agreement that this is not to be considered evidence or testimony given for the consideration of the Commission, but only as explanatory of the prepared evidence and to be used by the Commission and looked upon by the Commission as a background.

In other words, the intervenors, by refusing or not cross-examining any of these witnesses, do not in any manner agree with what is set out in this testimony.

58 We understood it was to be used merely for the Commission to look to as a background for this application.

PRESIDING EXAMINER: I think your statement correctly reflects the situation—is that right?

MR. WHITAKER: Yes, sir. I thought that was thoroughly understood.

MR. TRIMBLE: I did too. But in each instance it appears to me that this is being presented as evidence and testimony of witnesses.

PRESIDING EXAMINER: Mr. Trimble, I think the record shows that Mr. Whitaker, in response to my inquiry a few minutes ago, stated that to the extent that any of this testimony is inconsistent with the agreement reached, the agreement is to be controlling.

MR. TRIMBLE: I agree with that. I just wanted to voice my impression so there wouldn't later be any misunderstanding as to the form in which Mr. Whitaker is presenting this.

MR. FLAX: Mr. Examiner, there is one small point. Perhaps we are just playing with words. However, even to the extent this is consistent with the agreement, we don't necessarily agree with that testimony in that the final agreement might have been taken on a matter which was presented in that matter but to which we do not agree.

PRESIDING EXAMINER: All you are saying is that the stipulation you agreed upon is controlling for 59 the purpose of disposing of this case, except the tax item, as to which evidence is to be offered.

MR. FLAX: That is right. The results shown in the stipulation are controlling.

PRESIDING EXAMINER: Yes. There being nothing further, Mr. Wray, you are excused as a witness in this proceeding.

• • • •

Thomas W. Goodloe

was called as a witness, and having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. WHITAKER:

Q Please state for the record your name and your place of residence. A My name is Thomas W. Goodloe. I reside at Nashville, Tennessee.

Q If you are an official of the Tennessee Natural Gas Lines, Inc., please state what office you occupy. A I am President and Treasurer of Tennessee Natural Gas Lines.

Q Mr. Goodloe, pursuant to the order of the Commission, did you prepare certain testimony consisting of two-and-a-half pages which is found in this book of
60 prepared testimony? A I did.

Q Are the statements therein true and correct to the best of your knowledge, information and belief? A They are.

Q For the purpose of explanation only, do you adopt that as your testimony in this proceeding? A I do.

Q To the limited degree which has been agreed upon by the parties. A I do.

MR. WHITAKER: Now, that is all, Mr. Examiner, with reference to testimony bearing upon the stipulation which has been entered into. The remainder of Mr. Goodloe's testimony will relate to the unsettled question of the Tennessee gross receipts tax.

PRESIDING EXAMINER: If there is no objection, then, the two-and-a-half pages of prepared testimony of the witness Goodloe will be copied into the transcript at this point as though given orally.

(The material referred to above reads as follows:)

Prepared Testimony of Thomas W. Goodloe

My name is Thomas W. Goodloe and I reside in Nashville, Tennessee. I am President, Treasurer and Director

of Tennessee Natural Gas Lines, Inc. I served as Secretary and Treasurer from shortly after the organization of the company in 1945 until 1949 when I was elected Vice President, Secretary and Treasurer. I served
61 in this capacity until November 28, 1952, when I was elected President and Treasurer and became the chief executive officer of the company. I will testify with respect to rate of return and will also be the policy witness in this proceeding.

Tennessee Natural Gas Lines, Inc. is a very small company in comparison with other pipeline companies. The company's capitalization at December 31, 1953 was as follows:

First Mortgage 3¼% Bonds due 1971	$1,320,000
Debenture 4½% Bonds due 1972	285,000
Common Stock, $1 Par Value	664,600
Surplus	167,252
	$2,436,852

Tennessee Natural had $1,245,000 invested in capital stock of wholly-owned subsidiary, Nashville Gas Company, and $1,191,852, the remainder of capital funds, invested in pipe line business and operations at December 31, 1953.

At the time of filing the statements required by the Federal Power Commission Rules, a considerable study of the rate of return was included as Schedule F. Based upon the date therein contained, there was developed a fair rate of return from security markets and statistics of companies which are similar to Tennessee Natural Gas Lines with the important exception that the companies used were much larger than Tennessee Natural. The required return based upon the capitalization ratio of Tennessee Natural was at that time found to be 6.81%.

Upon the basis of this study, and of my general
62 knowledge of financial requirements, I determined that a proper rate of return to be applied to the depreciated original cost rate base of Tennessee Natural Gas Lines would be not less than 6½%.

Subsequent to the completion of the study shown by Schedule F there have been certain changes in market conditions and also changes in revenue levels of the companies shown there. At the present time, I do not believe that a restatement of the data shown in Schedule F would be determinative of particular trend in rate of return nor would it be necessary for the purposes of this proceeding.

While it is still my considered judgment that for a company of the size and characteristics of Tennessee Natural a rate of return of not less than 6½% is necessary to enable such a company to attract capital required for expansion of facilities and to maintain the company in a sound financial condition, the calculations based upon the test year ended December 31, 1953, which are submitted in this proceeding show that a return of slightly less than 6% would be derived from the filed rates.

It is my understanding fair and reasonable rates may not be found in excess of those which have been filed in a proceeding. There is, therefore, no particular benefit to be derived in urging a return upon the investment which would be in excess of that to be derived from the application of the filed rates.

For the purposes of this proceeding, a 6% rate
63 of return has been used because it justifies the revenues which would have been received during the test year based upon the filed rates, and further because such a return has been found in many recent proceedings and such use will tend to eliminate controversy in this proceeding. Tennessee Natural's use of a 6% rate of

return in computing the cost of service for this proceeding is not to be construed as an expression of what the company regards to be a fair and adequate rate of return.

PRESIDING EXAMINER: You may proceed, Mr. Whitaker.

BY MR. WHITAKER:

Q Mr. Goodloe, I believe the company, Tennessee Natural, has, for a number of years, been paying to the State of Tennessee a tax known as the gross receipts tax, has it not? A That is correct.

Q Are you familiar with certain correspondence between me, as counsel for the company, and the Attorney General of Tennessee, with reference to the company's liability for that tax? A I am.

MR. WHITAKER: Mr. Examiner, I would like to hand to the witness this exchange of letters, and request that it be incorporated in the record.

BY MR. WHITAKER:

Q Are they the letters to which you referred?

64 A Yes, they are the letters to which I referred.

PRESIDING EXAMINER: Is it your request, Mr. Whitaker, that they be copied into the record, or do you propose to have copies marked for identification?

MR. WHITAKER: I would just like to have them copied into the record, Mr. Examiner. I showed those letters to Mr. Trimble this morning, and he has read them and is familiar with the contents.

MR. TRIMBLE: Do you have copies of them?

MR. WHITAKER: No, sir, I don't. But if it is copied into the record, then we will all have copies available.

PRESIDING EXAMINER: I assume staff counsel has also seen them.

MR. FLAX: I haven't read them. However, I have seen them and I will take them to be copies of such letters.

MR. WHITAKER: One letter is dated January 3, 1948—that is my letter to the Attorney General—and his reply is dated January 23, 1948.

PRESIDING EXAMINER: Is there any objection? Without objection, the two letters referred to by counsel will be copied into the record at this point, the letter dated January 3, 1948, addressed to Honorable Roy H. Beeler, Attorney General, Nashville, Tennessee, to be copied into the record first.

(The letters referred to above read as follows:)

65

WHITAKER, HALL & HAYNES
Suite 1415
Hamilton National Bank Building
Chattanooga 2, Tennessee

January 3, 1948

Honorable Roy H. Beeler
Attorney General
Nashville, Tennessee

Dear Sir:

As attorney for Tennessee Natural Gas Lines, Inc. I will appreciate it if you will favor me with your opinion regarding the applicability of the tax imposed by Section 1248.126, Item C, of the Code to that company.

Tennessee Natural Gas Lines, Inc. operates only one gas line. This line extends from a point near Ashland City, Cheatham County, where it connects with the line of Tennessee Gas Transmission Company, to Westernia, Davidson County, where it connects with the distribution system of Nashville Gas and Heating Company. The function of this gas line is to convey natural gas from

the line of Tennessee Gas Transmission Company to the distribution system of Nashville Gas and Heating Company, which, as you know, serves the city of Nashville. The line of Tennessee Gas Transmission Company extends from the sourse of supply in Texas to West Virginia where natural gas is delivered. This line passes across the State of Tennessee at a point approximately fif-
66 teen miles west of Nashville. The only gas that is sold by Tennessee Gas Transmission Company in the State of Tennessee is that which is sold to Tennessee Natural Gas Lines, Inc., for resale to the Nashville Gas and Heating Company.

Tennessee Gas Transmission Company maintains pumping stations along its line for the purpose of increasing the natural pressure of the gas at the source of supply in order to accelerate the flow of gas through its line. The line of Tennessee Natural Gas Lines, Inc. receives gas from the line of Tennessee Gas Transmission Company at the same pressure at which it is maintained in the Tennessee Gas Transmission Company line, and delivers the gas to the system of Nashville Gas and Heating Company at reduced pressure. Tennessee Natural Gas Lines, Inc. does not maintain any pumping stations to effect the pressure of the gas passing through its line, but relies upon the pressure from the line of Tennessee Gas Transmission Company.

The line of Tennessee Natural Gas Lines, Inc. is approximately fifteen miles in length, and there are no lines that connect with it other than that of Nashville Gas and Heating Company. All of the gas that is purchased by Tennessee Natural Gas Lines, Inc. is resold to Nashville Gas and Heating Company.

Tennessee Natural Gas Lines, Inc. does not own or operate any system for the distribution of gas.
67 The distribution of gas to the city of Nashville is conducted entirely by the Nashville Gas and Heat-

ing Company, which is a wholly owned subsidiary of Tennessee Natural Gas Lines, Inc.; Nashville Gas and Heating Company pays the tax imposed by Section 1248.126, Item G, upon the distribution of natural gas.

The Tennessee Natural Gas Lines, Inc. has been paying the tax imposed by the above statute; however, after giving the question careful consideration, it is our view that that company is not liable for the tax for the reason that it is not engaged in the *distribution* of natural gas within the meaning of the statute, and for the reason that it is not engaged in intrastate commerce, and for the further reason that payment of the tax by Tennessee Natural Gas Lines, Inc., in addition to payment of the tax by its wholly owned subsidiary, Nashville Gas and Heating Company, results in double taxation upon the distribution of gas to the city of Nashville, which was not intended by the statute.

I refer you to the interpretation of the statute by Chief Justice Green in the case of Memphis Natural Gas Company vs. McCanless, 180 Tenn. 688. In that case the Court said:

"It will be observed with respect to natural gas that the tax is only levied on '*distributing* . . . natural gas.'"

In that case the Court further said:

68 "All the foregoing cases by the Supreme Court, except Southern Natural Gas Corp. v. Alabama, (301 U. S. 148), were decided prior to the enactment of the Public Acts of 1937. These decisions were familiar. It was understood from them that the transportation of natural gas from another state and its sale at the carrier's pipe to another was interstate commerce. But that the distribution of gas through service pipes in a particular locality and sale at the burner tips was intrastate commerce. That distributing the commodity was a local activity. It was well understood what the term distributor meant and we do not think that the complain-

ant here was a distributor or was distributing natural gas in the sense of the statute after the purchase of the properties of the Memphis Power and Light Company by the City of Memphis."

We do not believe that the operation of Tennessee Natural Gas Lines, Inc., as above set out, constitutes the distribution of gas within the meaning of the statute. The statute in question expressly provides that "It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce."

We believe that the activity of Tennessee Natural
69 Gas Lines, Inc. is "a part of interstate commerce,"
and for this reason is not within the purview of the statute. As above set forth, the sole function of Tennessee Natural Gas Lines, Inc. is to complete the delivery of gas from its out-of-state source to the distribution system of Nashville Gas and Heating Company. This is done without change in the pressure of the gas and without any splitting up of the gas supply, which could be termed a local distribution of the gas. The gas flows in a continuous, uninterrupted and individed stream from its interstate source through the lines of Tennessee Natural Gas Lines, Inc.

In the case of East Ohio Gas Company vs. Tax Commission, 288 U. S. 465, 75 Law Ed. 1171, which involved the application of an Ohio privilege tax to a natural gas company, the Court defined the point at which natural gas passes from interstate to intrastate commerce as follows:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within, as well as without, that state. The mere

fact that the title or the custody of the gas passes while
it is en route from state to state is not determinative of
the question where interstate commerce ends. Pub-
70 lic Utilities Commission v. Landon, 249 U. S. 239,
245, 63 L. ed. 577, 586, P.U.R. 1919C, 834, 39 S. Ct.
268; Missouri ex rel. Barrett v. Kansas Natural Gas Co.
265 U. S. 298, 307-309, 68 L. ed. 1027, 1029, 1030, 44 S.
Ct. 544; Peoples Natural Gas Co. v. Public Serv. Com-
mission, 270 U. S. 550, 554, 70 L. ed. 726, 729, 46 S. Ct.
371; Public Utilities Commission v. Attleboro Steam &
Electric Co. 273 U. S. 83, 89, 71 L. ed. 549, 553, 47 S. Ct.
294. But when the gas passes from the distribution lines
into the supply mains, it necessarily is relieved of nearly
all the pressure put upon it at the stations of the pro-
ducing companies, its volume thereby is expanded to many
times what it was while in the high pressure interstate
transmission lines, and it is divided into the many thou-
sand relatively tiny streams that enter the small service
lines connecting such mains with the pipes on the con-
sumers' premises. So segregated the gas in such service
lines and pipes remains in readiness or moves forward
to serve as needed. The treatment and division of the
large compressed volume of gas is like the breaking of
an original package, after shipment in interstate com-
merce, in order that its contents may be treated, pre-
pared for sale and sold at retail. State ex rel.
71 Castor v. Flannelly, 96 Kan. 372, 383, 384, P. U. R.
1916C, 810, 152 Pac. 22; West Virginia & M. Gas
Co. v. Towers, 134 Md. 137, 143-145, P.U.R. 1919D, 332,
106 Atl. 265. Cf. Atlantic Coast Line R. Co. v. Standard
Oil Co., 275 U. S. 257, 269, 72 L. ed. 270, 274, 48 S. Ct.
107; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678;
Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters.
Com. Rep. 36, 10 S. Ct. 681. It follows that the fur-
nishing of gas to consumers in Ohio Municipalities by

means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

If it could be said that owing to the stock control of Nashville Gas and Heating Company by Tennessee Natural Gas Lines, Inc., Nashville Gas and Heating Company is the agent of Tennessee Natural Gas Lines, Inc., so that Tennessee Natural Gas Lines, Inc. would be distributing gas to the city of Nashville through the agency of Nashville Gas and Heating Company, then the tax would have been paid by the agent and the principal would not, as we see it, be liable for a duplicate tax upon the activity of its agent. In the case of Memphis Natural Gas Company vs. McCanless, supra, Chief Justice Green said:

72 "We do not think there is any liability on the part of the complainant for the gross receipts tax during the time in which gas was being distributed as a joint enterprise by complainant and Memphis Power and Light Company. It appears that the tax was paid during those years by Memphis Power and Light Company and the enterprise being joint, a sort of partnership, only one tax was due. Only a single tax on the entity pursuing the activity."

For the foregoing reasons I have reached the conclusion that Tennessee Natural Gas Lines, Inc. is not liable for the tax in question; however, before advising my client, I would very much appreciate it if you would write me whether you concur in my opinion.

With best wishes, I am

Respectfully yours,

PBW/rw For Whitaker, Hall & Haynes

73 STATE OF TENNESSEE
Roy H. Beeler
Attorney General & Reporter

C O P Y

Office of the
ATTORNEY GENERAL
Supreme Court Building
Nashville 3, Tennessee

January 23, 1948

Hon. Phil B. Whitaker
Attorney at Law
Hamilton National Bank Bldg.
Chattanooga 2, Tennessee

Dear sir:

Your letter of January 3, 1948, to Roy H. Beeler, Attorney General, has been referred to me for attention and reply.

I note you contend that Tennessee Natural Gas Lines, Inc., is not liable to pay the tax imposed by Section 1248.126, Item B, of the Code, for three reasons: (1) The company is not engaged in the distribution of natural gas within the meaning of the statute. (2) The company is not engaging in intrastate commerce. (3) The payment of the tax by Nashville Gas & Heating Co., a wholly owned subsidiary of Tennessee Natural Gas Lines, Inc., constitutes a sufficient payment of the tax to satisfy any liability of the Tennessee Natural Gas Lines, Inc.,
74 supposing said company to be liable for the tax.

After some study of your contentions and the authorities you marshal in support thereof, and after consideration of other authorities on the subject, I find that I am unable to agree with the conclusion you have reached.

In my opinion the Tennessee Natural Gas Lines, Inc., is liable to pay the tax imposed by section 1248.126 of the Code, Item G.

In support of your first contention, that the company is not liable for the tax for the reason that it is not engaged in the distribution of natural gas within the meaning of the statute, reference is made to Memphis Natural Gas Co. v. McCanless, 180 Tenn. 688. It seems to me the opinion of the Supreme Court in this case cannot be applied so as to sustain the concluusion that the tax does not apply to the Tennessee Natural Gas Lines, Inc. I say this for the reason, Memphis Natural Gas Co., which was held not to be engaged as a distributor of natural gas within the meaning of Section 1248.126, Item G, did business in a manner altogether different from that in which the Tennessee Natural Gas Lines, Inc., does business. As pointed out in the opinion, Memphis Natural Gas Co. maintained a pipe line from Louisiana, through Arkansas into Mississippi, to the outskirts of the City of Memphis in Tennessee. From Memphis, it had other and similar pipe lines passing through Shelby County, which reach Brownsville, Humboldt, Jackson and other Tennessee towns. The gas transported by Memphis Natu-
75 ral Gas Co. moved in a continuous flow from
Louisiana to points in Tennessee. All of this movement was within the pipe line maintained and owned by Memphis Natural Gas Co. After reciting these facts the court said: "Upon these facts we do not think it can be said that complainant is distributing natural gas or is a distributor."

The situation of the Tennessee Natural Gas Lines, Inc. is radically different from Memphis Natural Gas Co. As I understand from your letter and other information before me, your company operates a gas line some fifteen miles in length lying wholly within Tennessee. The company is operated for the purpose of buying natural gas wholesale from the Tennessee Gas Transmission Company and transporting it to Davidson County where it is sold to Nashville Gas & Heating Co., for retail distribution by this company.

There is no interstate transportation of gas by Tennessee Natural Gas Lines, Inc., such as existed in the case of Memphis Natural Gas Co. For this reason, the conclusion reached in the Memphis Natural Gas Co. v. McCanless case would not apply to the Tennessee Natural Gas Lines, Inc.

It is quite plain the Supreme Court predicated its conclusion that Memphis Natural Gas Company could not be taxed under Section 1248.126, Item G. on the constitutional ground that the commerce clause operated to prevent the tax from applying. 76 No where in the opinion is any reference made to the insufficiency of the inadequacy of the Act to tax the Memphis Natural Gas Company in the absence of the commerce clause of the Constitution of the United States.

Accordingly, this opinion is not authority, showing the limitations of Section 12481126, Item G. where the commerce clause is not involved.

With regard to the second contention, to the effect that Tennessee Natural Gas Lines, Inc., is not engaged in intrastate commerce, we are unable to agree. We say this because, in our opinion, the fact that Tennessee Natural Gas Lines, Inc., operates wholly within Tennessee, buying its gas from an interstate carrier and transporting it to Davidson County where it sells it to another corporation, constitutes engaging in intrastate commerce in Tennessee.

It should be borne in mind that Tennessee Natural Gas Lines, Inc., is not a common carrier of gas. It is engaged in the carriage of gas which it buys solely for itself, and cannot be likened to the ordinary transportation company which serves to complete a part of the interstate journey of an article of commerce.

Here, we have a case where a Tennessee corporation owning a pipe line lying wholly in Tennessee, buys an article at one end of the pipe line for sale at the other end of the pipe line, and then transports the article to the other end of the pipe line where it sells it. All
77 of this transaction occurring as it does in Tennessee, no state lines being involved in it, it seems to me that it is essentially and necessarily intrastate commerce.

The case of East Ohio Gas Co. v. Tax Commission, 288 U. S. 465, 75 L. Ed. 1171, referred to in your letter, can hardly be said to settle this matter contrary to the conclusion we have reached. This case involved the right of the Tax Commission of Ohio to regulate the East Ohio Gas Company, a right which was sustained by the Supreme Court of the United States. It did not involve the question presented by your letter which we are considering here.

With regard to your third contention, the payment of the tax imposed by Section 1248,126, Item G, by the Nashville Gas & Heating Co. constitutes payment of any tax which might be owed by Tennessee Natural Gas Lines, Inc., because the former corporation is a wholly owned subsidiary of the latter corporation, which contention is predicated upon a part of the decision in the case of Memphis Natural Gas Co. v. McCanless, supra., we beg to point out that in our opinion the case of Memphis Natural Gas Co. v. McCanless is misapplied. As we view it, this case is not authority for the contention you make here.

Memphis Natural Gas Co. and Memphis Power and Light Co. were operating as a partnership, and
78 Memphis Power and Light Co. paid the tax on the gross receipts received from the retail distribution of natural gas. After the payment of the gross receipts tax the proceeds were divided between the two partners according to an intricate formula set up in the articles

of partnership. Memphis Natural did not sell to Memphis Power, it merely delivered and shared in profits from retail sale. It was on this account the Supreme Court held the payment of the tax by the retail distributing partner, on the gross receipts, relieved the wholesale distributing partner of liability to pay the tax on its share.

No such situation exists in the case of Tennessee Natural Gas Lines, Inc., and the Nashville Gas & Heating Co. Tennessee Natural Gas Lines, Inc., buys natural gas from Tennessee Gas Transmission Co., transports it to Nashville and sells it to Nashville Gas & Heating Co. On this transaction both corporations make a separate profit, upon which, because they are exercising a privilege unlimited by the commerce clause of the Constitution, they must pay a tax in accordance with Section 1248.126, Item G.

It should be appreciated immediately, that here there is no such unity of entity as would make the payment of the tax by one of the parties payment for the other.

For the reasons and on account of the views expressed in this letter, it is my opinion that Section 1248.126, Item G, levies a tax upon Tennessee Natural Gas Lines, Inc.

79 During the course of my investigations of this matter, I learned from the Railroad and Public Utilities Commission that Tennessee Natural Gas Lines, Inc., is not paying any utility inspection fee. If you should write to me further, I would appreciate your views on the liability of Tennessee Natural for these fees.

Yours very truly.

/s/ Allison B. Humphreys, Jr.
Advocate General

ABHjr:AY

80 BY MR. WHITAKER:

Q Mr. Goodloe, following that exchange of letters in which the Attorney General held that the company was liable for this tax, is it or is it not true that representatives of the company had various conferences with the taxing authorities and with the Attorney General's office, in an effort to convince those officials that the company was not liable for this tax. A That is correct.

Q But were the company representatives ever successful in convincing them that the company was not liable for the tax? A No, we were advised that the company would have to pay the tax.

Q And it has been paying it, I believe you said, since that time. A That is correct.

Q Mr. Goodloe, I think it is true that Tennessee Natural buys its entire gas supply from Tennessee Gas Transmission Company, does it not? A That is correct.

Q And that company transports the gas from the States of Texas and Louisiana to a point in Tennessee where Tennessee Natural takes the gas from it, does it not? A That is correct.

Q Does Tennessee Natural have any compres-
81 sion on its own line or does the gas flow out of Tennessee Transmission Company's line into Tennessee Natural's on the pressure supplied by Tennessee Gas Transmission Company? A Tennessee Natural has no compressor stations and the gas flows entirely on the pressure received at the take-off point from the Tennessee Gas Transmission Company through Tennessee Natural's lines to the point of delivery to its customers.

MR. WHITAKER: That is all I have, Mr. Examiner.

PRESIDING EXAMINER: Is there any cross-examination?

MR. TRIMBLE: Yes, sir.

Cross Examination

BY MR. TRIMBLE:

Q Mr. Goodloe, would you explain the relationship between Tennessee Natural Gas Lines, Inc. and the Nashville Gas Company. A What relationship?

Q Their relationship to each other. A Tennessee Natural owns all of the capital stock of Nashville Gas and Heating Company.

Q Has that relationship been in existence since the inception of Tennessee Natural Gas Company? A Well, I would say since shortly after the inception of Tennessee Natural Gas Company.

82 Q Now, are you familiar with all the facets, legal facets of this Tennessee gross receipts tax and the payment thereof by these two companies? A Familiar—you mean that both companies are paying tax?

Q Yes. A Yes, I am.

Q And both companies have been paying this identical tax since the inception of Tennessee Natural Gas Company, is that correct? A I think we began paying the tax in the year '47 or '48. That was a year or two after the formation of Tennessee Natural Gas Lines.

Q And Tennessee Natural Gas Company pays this tax on gas running through its lines to the Nashville Gas Company, is that correct? A That is right.

Q Now, I will ask you if—

MR. WHITAKER: May I ask a question for clarification at this point?

MR. TRIMBLE: Surely.

MR. WHITAKER: The gross receipts tax is also measured by sales to the DuPont Company in addition to sales to the Nashville Gas Company, is it not?

THE WITNESS: That is correct.

BY MR. TRIMBLE:

83 Q Now, the operation of the Tennessee Natural Gas Company Inc. in furnishing gas to other con-

sumers than the Nashville Gas Company has been changed drastically since these negotiations were had with the Attorney General of the State of Tennessee, isn't that correct? A I would like to get that question again, please.

PRESIDING EXAMINER: The reporter will read the question.

(The reporter read the pending question.)

THE WITNESS: Well, we have begun serving other customers since that time.

MR. WHITAKER: For clarification, will you state what other customer you serve except the Nashville Gas Company.

THE WITNESS: The DuPont Company.

MR. WHITAKER: Is that the only other customer?

THE WITNESS: That is the only other customer.

BY MR. TRIMBLE:

Q Now, did you yourself carry on any of these negotiations you testified to on your direct examination with the State Attorney General's Office? A I think I was in one meeting. Most of that was handled by Mr. Schutt and Mr. Whitaker.

Q All you know of and can speak and testify to is to one meeting, is that correct? A That is correct.

Q When was that meeting held, approximately?

84 A I don't have it. It is along about the time of this correspondence here. I don't recall.

PRESIDING EXAMINER: You mean the two letters that have been copied into the record?

THE WITNESS: Yes, sir.

BY MR. TRIMBLE:

Q Has this determination on the part of the Attorney General of the State of Tennessee been contested by any court action? A So far as I know, it has not.

MR. WHITAKER: I am willing to agree it has not.

Let the record show it has not been contested in court by this company.

BY MR. TRIMBLE:

Q Whose decision was it not to contest it? A Well, I imagine that was—

Q Do you know? A Well, it just was not contested. I don't know who made the decision.

Q And any other negotiations that have been carried on are just hearsay as far as you are concerned, other than the one meeting you say you attended. A Well, I have letters here and I have been in conversation with Mr. Schutt and Mr. Whitaker. The tax I have regarded as a legal matter, and it was being largely handled by the attorney representing the company, who is Mr.
85 Whitaker.

Q Well, in any negotiations that have been carried on relative to Tennessee Natural Gas paying this tax, they were carried on by others than yourself connected with that corporation, is that correct?

MR. WHITAKER: Pardon me, I didn't get the question.

(The reporter read the pending question.)

THE WITNESS: It was carried on largely by our counsel. As I say, it was a legal matter.

BY MR. TRIMBLE:

Q I will ask you, Mr. Goodloe, if this gas was supplied directly by Tennessee Gas Transmission Lines to Nashville Gas Company without the intervention of Tennessee Natural Gas Company Inc., this matter we are discussing, in so far as gross receipts tax, of course, would not be due or payable from Tennessee Natural Gas, isn't that correct?

MR. WHITAKER: I will object to that as calling for a legal conclusion from the witness.

MR. TRIMBLE: It is no legal conclusion. Well, I will rephrase it. Strike it.

BY MR. TRIMBLE:

Q If Tennessee Natural Gas were not in operation and carrying on the operation they are now carrying on, this tax, of course, would not be assessed to them or paid by them, isn't that correct?

86 MR. WHITAKER: We are willing to admit if we were not in business we wouldn't be paying the tax.

MR. TRIMBLE: That is not the whole question.

MR. WHITAKER: That is the way I understood it.

PRESIDING EXAMINER: Maybe you had better ask it again.

MR. TRIMBLE: I will ask it again.

BY MR. TRIMBLE:

Q Isn't it true that if, first of all, Tennessee Natural were not in business, of course you would not be paying the tax. Secondly, if Tennessee Natural Gas was not in business and operating as they are now, as receiving the gas from Tennessee Transmission, supplying it to Nashville Gas, if you didn't play that intermediary role, there would be no tax assessed to Tennessee Natural, isn't that correct? A Well, if they were not in business, they would not be selling gas to anybody.

PRESIDING EXAMINER: Is your question that if Tennessee Gas was serving the Nashville distributor directly instead of through Tennessee Natural would the tax be paid?

MR. TRIMBLE: That is right. Not only as to them being in business, but operating as they have chosen to operate.

BY MR. TRIMBLE:

Q Do you understand the question? A I would like to have it restated.

BY MR. TRIMBLE:

87 Q It has been stipulated if Tennessee Natural Gas were not in business, of course there would be

no tax assessed to them. Now, if the operation of Tennessee Natural were not as it is at this time and has been since its inception, then the tax also would not have been assessed to them, is that correct?

MR. WHITAKER: I object to that as calling for a legal conclusion. He says the operation as it is now. They might have been selling to a dozen other people and not to the Nashville Gas Company and still it becomes a question of law as to whether or not they are liable for the tax.

PRESIDING EXAMINER: The objection is sustained.

MR. TRIMBLE: Note an exception.

BY MR. TRIMBLE:

Q If Tennessee Natural Gas Company and Nashville Gas Company elected to merge and become one company, then that would do away with this tax on Tennessee Natural, would it not? A Well, Tennessee Natural would not be in existence if they merged.

Q That would do away with the tax, would it not?

MR. WHITAKER: Again, we are willing to agree that we wouldn't be paying the tax if we were not in existence.

MR. TRIMBLE: If we can stipulate if a merger came about this tax would become unnecessary—

MR. WHITAKER: I am willing to stipulate if a merger came about the merged company only would pay the tax, of course.

88 MR. TRIMBLE: I believe that is all. Thank you, Mr. Goodloe.

PRESIDING EXAMINER: What is the amount of this tax?

THE WITNESS: This tax is one-and-one-half of the gross receipts—gross sales,—less some credits for other taxes.

PRESIDING EXAMINER: In other words, it varies from year to year.

THE WITNESS: It varies from year to year, depending on volume and other factors. There are two taxes which serve as a deduction from this tax. In other words, it is an over-all one-and-a-half percent tax with credit against it for two other types of taxes.

PRESIDING EXAMINER: In view of the questions asked by Mr. Trimble and Mr. Whitaker's statements, that the tax wouldn't be paid in the event of a merger, does that mean that both the distributor and the transportation company, Tennessee Natural, pays the tax?

THE WITNESS: That is correct. At the present time it is.

PRESIDING EXAMINER: And what you are saying is that one of the taxes would be eliminated as a result of the merger.

THE WITNESS: It would only be paid by the resulting company, whichever company that was.

MR. TRIMBLE: That is the whole point, Mr. Examiner.

PRESIDING EXAMINER: I see. Is there any cross-examination by staff counsel? I was just trying to clear that up.

MR. FLAX: Just a few questions.

89 BY MR. FLAX:

Q Mr. Goodloe, at what pressure do you receive gas from Tennessee Gas Transmission—that is Tennessee Natural receive gas? A It runs from—we have our engineer here on that question—but I think the average runs from 425 to 625 pounds per square inch. Correction —475 to 625.

Q Now, if you know, at what pressure is gas delivered to Nashville Gas Company? A We have five delivery points, and I don't have that information. I think Mr. Wray would have to supply that.

MR. WHITAKER: Mr. Examiner, we are perfectly willing to supply that information. Mr. Goodloe, however, is not the engineer for the company. Mr. Wray can give all of that information, if you want it, accurately.

PRESIDING EXAMINER: Would it make any difference if the pressure at the tap is adequate for distribution purposes, as I understood his testimony a while ago?

THE WITNESSS: That is correct.

PRESIDING EXAMINER: Is there any point in him supplying the information?

MR. FLAX: All I want to do is to establish that the nature of Tennessee Natural is a transmission company as opposed to what is commonly termed a distribution company. And if Mr. Goodloe will state that that is his understanding of the operation of his company, I
90 think that would be satisfactory for my purposes.

MR. WHITAKER: I don't believe I quite understand, Mr. Flax. What is it? Maybe we can stipulate, if you will tell me what you want.

MR. FLAX: I merely want to establish the fact that the nature of the operation of Tennessee Natural, within the terms as generally accepted in the industry—that Tennessee Natural is a transmission pipeline company as opposed to a distribution company, and the distribution company in this system is that of the Nashville Gas Company.

MR. WHITAKER: Well, I am not sure that I am entirely familiar with just how the terms are used in the industry. It is true that Tennessee Natural, as shown by Exhibit No. 7, operates a pipeline company, Exhibit No. 7 being the map, and transports gas which it purchases from Tennessee Gas Transmission Company and delivers it to only two customers, namely, the Nashville Gas Company and the DuPont Company. And I think it is further true that the total length of lines which Tennessee Natural owns is something like 30 miles. Is that sufficient?

MR. FLAX: Well, the other matter that I wanted to be certain of in regard to this is pressure—that Tennessee Natural operates at high pressure—and if Mr. Wray could tell Mr. Goodloe—

MR. WHITAKER: That is true. We admit that 91 it does operate at high pressure and when delivered to DuPont or the Nashville Gas Company those pressures have to be reduced.

MR. WRAY: Correct.

MR. FLAX: And that the distribution is handled entirely by Nashville Gas Company.

MR. WHITAKER: Yes, sir, that is correct.

MR. FLAX: All right. That is all.

PRESIDING EXAMINER: Any further questions?

MR. FLAX: I have no further questions.

PRESIDING EXAMINER: Any redirect?

MR. WHITAKER: No, sir.

PRESIDING EXAMINER: There being nothing further, Mr. Goodloe, you are excused as a witness in this proceeding.

(Witness excused)

• • • •

92 MR. WHITAKER: Mr. Examiner, I have a statement to make in the record which probably would be more appropriate made at this time, following Mr. Goodloe's testimony.

As counsel for the company, and being authorized by the management of the company, it is the company's purpose to pay under protest the gross receipts tax which is due and payable on August 1, 1954. And the company will do that. And in the event the company is suc- 93 cessful in litigation which will ensue for the recovery of the taxes so paid, the company here and now agrees to pay over to its subsidiary, the Nashville Gas Company, all portions of that tax so recovered which relate to sales made by Tennessee Natural to the Nashville Gas Company. And we further propose and will pursue that litigation to the court of last resort having jurisdiction.

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Tennessee Natural Gas Lines, Inc.
Comparison of Revenues Under Present, Proposed and Stipulated Rates (1953)

		Presently Effective Rate	Company Proposed Rate	Stipulated Rate without G. R. Tax	Stipulated Rate Including G. R. Tax
Annual Sales (MCF)	7,754,322				
Billing Demand (MCF)	506,517				
RATES		$2.15 1st 13,500	$2.175 All Demand	$2.16 1st 36,800	$2.20 1st 36,800
		1.725 All Excess		1.80 All Excess	1.82 All Excess
		15¢	16¢	15.4¢	15.6¢
REVENUES					
Dem. 1st Block		$348,300	$1,101,892	$953,856	$971,520
2nd Block		594,464		117,031	118,331
Comm.		1,163,148	1,240,692	1,194,166	1,209,674
		$2,105,912	$2,342,584	$2,265,053	$2,299,525
Less Present Rate Revenue			2,105,912	2,105,912	2,105,912
Increase			$ 236,672	$ 159,141	$ 193,613

• • • •

98 **MR. WHITAKER:** Mr. Examiner, I would like to supplement the statement which I made a few
99 moments ago with reference to the litigation which the company will institute with regard to its liability for the gross receipts tax by saying that the company will bear the entire expense of such litigation without directly or indirectly burdening its customers with any such expense.

• • • •

PRESIDING EXAMINER: Well, let me go back now and repeat a question which I previously asked and which was premature at the time in view of the last two amendments which staff counsel read into the record.

Do all counsel to this proceeding agree that this case is to be submitted to and disposed of by the Commission on the basis set forth in the proposed settlement as now reflected in the record.

MR. WHITAKER: Yes, sir, we do.

MR. TRIMBLE: Yes, sir, the intervenors do.

MR. FLAX: Yes, sir, staff does.

* * * *

100 PRESIDING EXAMINER: This proceeding, as
has previously been indicated, rose out of rate increases filed by Tennessee Natural, and which, had they become effective on the proposed effective date, would have resulted in an increase of $226,683 annually to Tennessee Natural's affiliate and only resale customer,
101 Nashville Gas Company. What is the effect of the
proposed settlement? Is it less than $226,683? Could you give me the answer to the question, Mr. Flax?

MR. FLAX: Yes, sir. The amount of the increase upon a cost of service which would include the gross receipts tax is $193,613, and upon a cost of service which would exclude the gross receipts tax would be $159,141.

PRESIDING EXAMINER: And those two figures compare with the $226,683 annual charge to which I referred a few moments ago.

MR. FLAX: It is my understanding it does, Mr. Examiner. I think I should call attention to the fact that the period at which the settlement was prepared was for the calendar year 1953, and the figure that you read would be for other than the calendar year. For the calendar year 1953 the company's proposed rate would produce $236,672 as opposed to the figure you read, I believe, of $226,683.

PRESIDING EXAMINER: Is the increase applicable only to the distributor, Nashville Gas Company?

MR. FLAX: Yes, sir, that is the only customer.

* * * *

Received Feb 1 10 33 AM '54
Federal Power Commission

FEDERAL POWER COMMISSION
Docket No. G 2255 Hearing Ex. No. 1
Date Identified Feb 19 1954 Date Admitted Feb 19 1954

Docket No. G-2255
Exhibit No. 1
Page 1 of 3

TENNESSEE NATURAL GAS LINES, INC.

Balance Sheet

(Per Company Books)

	(1)	(2)	(3)
Line No.		Year Ending Dec. 31, 1952	Dec. 31, 1953
1	ASSETS		
2	GAS PLANT, at original cost	$1,268,976.55	$1,280,369.24
3	Less Reserve for Depreciation and Amortization	94,742.49	124,970.60
4	Plant Less Reserve	$1,174,234.06	$1,155,398.64
5	INVESTMENT		
6	Capital Stock in Wholly Owned Subsidiary	$1,245,000.00	$1,245,000.00
7	CURRENT ASSETS:		
8	Cash	$ 64,822.83	$ 167,667.31
9	Receivable from Gas Customers	234,649.97	302,596.23
10	Receivable—Dividends	11,250.00	11,250.00
11	Prepayments	1,021.05	349.01
12	Total Current Assets	$ 311,743.85	$ 481,862.55
13	DEFERRED DEBITS:		
14	Unamortized Debt Discount and Expense (Bonds)	$ 28,837.65	$ 27,249.33
15	CAPITAL STOCK EXPENSE:		
16	Common Stock Expense	$ 1,046.10	$ 716.10
17	TOTAL ASSETS	$2,760,861.66	$2,910,226.62

Docket No. G-2255
Exhibit No. 1
Page 2 of 3

TENNESSEE NATURAL GAS LINES, INC

Balance Sheet

(Per Company Books)

Line No.	(1)	(2) Year Ending Dec. 31, 1952	(3) Year Ending Dec. 31, 1953
1	LIABILITIES		
2	CAPITALIZATION:		
3	Capital Stock and Surplus		
4	Common stock, par value $1 per share, authorized 750,000 shares, issued and outstanding 664,600 shares	$ 664,600.00	$ 664,600.00
5	Earned Surplus	109,377.72	167,251.98
6		$ 773,977.72	$ 831,851.98
7	Long-Term Debt		
8	First Mortgage and Collateral Trust 3¼% Bonds, Series A, due January 1, 1971	$1,360,000.00	$1,320,000.00
9	Sinking Fund Debentures, 4½% Series, due July 1, 1972	300,000.00	285,000.00
10	Total Capitalization	$2,433,977.72	$2,436,851.98
11	CURRENT LIABILITIES:		
12	Accounts payable	$ 213,776.87	$ 290,793.38
13	Accruals		
14	Federal Income Taxes	82,645.45	29,954.85
15	Other Taxes	28,445.54	40,784.32
16	Dividends Declared		83,075.47
17	Interest—Bonds		26,862.50
18	Total Current	$ 324,867.86	$ 471,470.52
19	DEFERRED CREDITS:		
20	Unamortized Expense		
21	Premium on Debt	$ 2,016.08	$ 1,904.12
22	TOTAL LIABILITIES AND CAPITALIZATION	$2,760,861.66	$2,910,226.62

Docket No. G-2255
Exhibit No. 1
Page 3 of 3

TENNESSEE NATURAL GAS LINES, INC

Statement of Earned Surplus

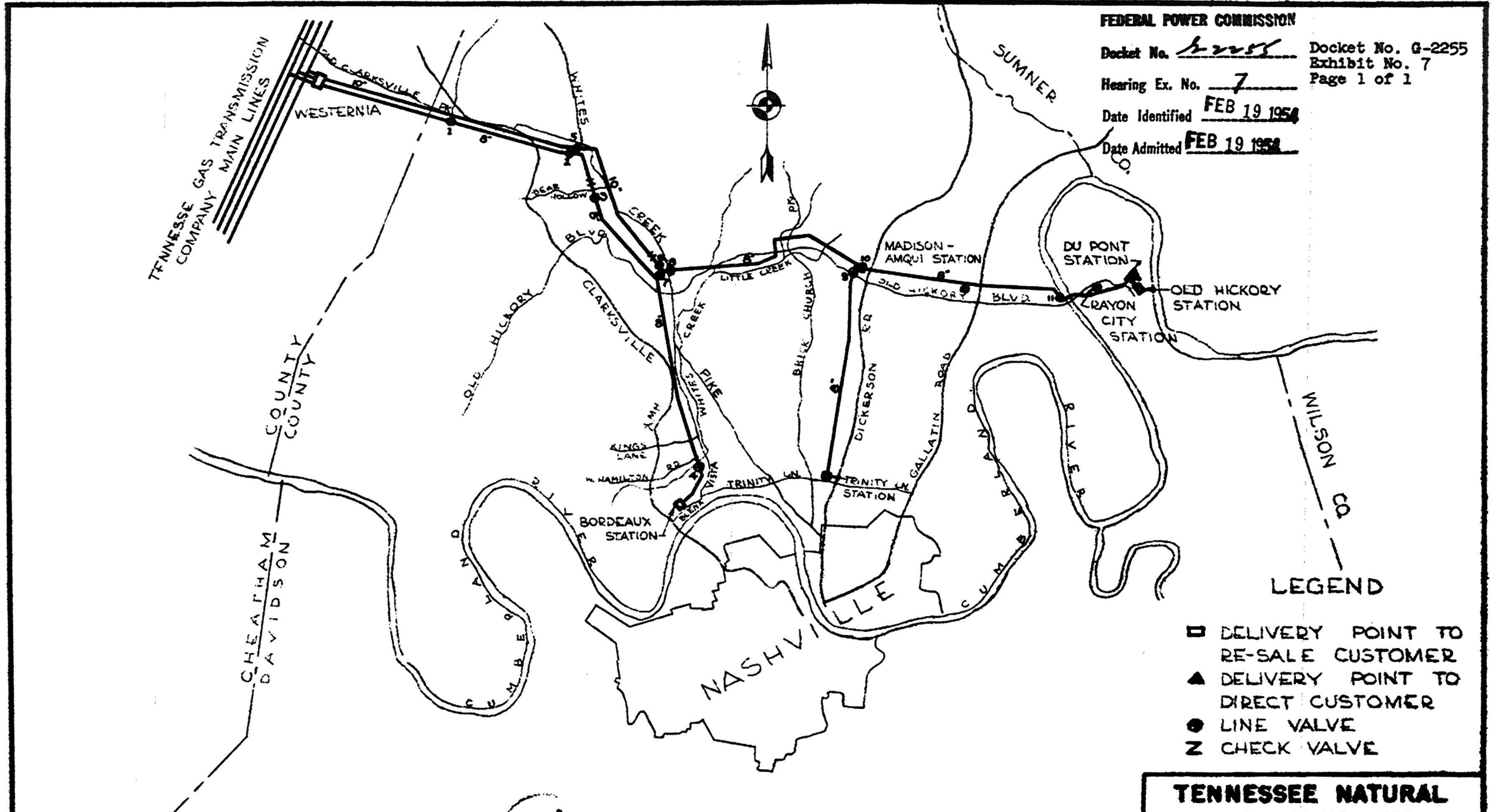
DECEMBER 31, 1953

(Per Company Books)

Line No.	(1)	(2)	(3)
1	Balance December 31, 1952		$ 109,377.72
2	Capital Stock Expense (Prior Years)	$ 330.00	
3	Depreciation Adjustment (Prior Years)		665.55
4	Gain Year Ended December 31, 1953		389,840.58
5	Dividends Paid (Common)	332,301.87	
6	Balance December 31, 1953		$ 167,251.98

FEDERAL POWER COMMISSION
Docket No. G-2255
Hearing Ex. No. 7
Date Identified FEB 19 1954
Date Admitted FEB 19 1954

Docket No. G-2255
Exhibit No. 7
Page 1 of 1



LEGEND

- ▭ DELIVERY POINT TO RE-SALE CUSTOMER
- ▲ DELIVERY POINT TO DIRECT CUSTOMER
- ● LINE VALVE
- Z CHECK VALVE

TENNESSEE NATURAL GAS LINES INC.
SYSTEM MAP

SCALE: 1"=2 MILES DRAWN BY: R.L.S.
JANUARY 1954

WESTERNIA TO WHITES CREEK JUNCTION	8.48 MILES
WHITES CREEK JUNCTION TO BORDEAUX STATION	5.43 MILES
WHITES CREEK JUNCTION TO VALVE 10	4.68 MILES
VALVE 10 TO TRINITY LANE STATION	4.53 MILES
VALVE 10 TO DU PONT STATION	6.75 MILES

Docket No. G-2255

Exhibit 8

Tennessee Natural Gas Lines, Inc.
Rate Base and Cost of Service
Year 1953

				Explanation of Differences					
Particulars (1)	Per Company (2)	Per Staff (3)	Differences (Company) over Staff (4)	Original Cost Adjustments (5)	Sundry Non-recurring Items (6)	Credit for Excessive Admin. & Gen. Expenses (7)	Tennessee Gross Receipts Tax (8)	Difference in Gross Revenues due to Adjustments (9)	Tenn. Gas Trans. Co. of Settlement Rate (10)
RATE BASE									
Gas Plant in Service	$1 274 673	$1 245 456	($ 29 217)	$ 29 217					
Reserves: Depreciation	105 534	104 500	(1 034)	1 034					
Amortization	4 323	—	(4 323)	4 323					
Net Investment Rate Base	$1 164 816	1 140 956	(23,860)	$ 23 860	—	—	—	—	—
COST OF SERVICE									
Purchased Gas	$2 738 521	$2 698 395	($ 40 126)						$ 40 126
Transmission	16 166	16 166	—						
Sales Promotion Expenses	—	495	495	($ 495)					
Administrative & General	38 357	19 929	(18 428)		$ 3 428	$ 15 000			
Depreciation	30 799	30 543	(256)	256					
Amortization	625	—	(625)	625					
Taxes: Other	62 406	22 777	(39 629)				$ 38 914	$ 715	
Federal Income	33 842	32 278	(1 564)	1 564					
Return @ 6%	69 889	68 457	(1 432)	1 432					
Total Cost of Service	$2 990 605	$2 889 040	($101 565)	$ 3 382	$ 3 428	$ 15 000	$ 38 914	$ 715	$ 40 126

Column 8 represents Tennessee Gross Receipts Tax of $38,914 the sole remaining item on which agreement has not been reached between the company and staff.

Exhibit 9

Docket No. G-2255

Tennessee Natural Gas Lines
Allocation of Cost of Service, Demand Commodity Basis
(1953)

	Total	Demand	Commodity
ADJUSTED COST OF SERVICE			
Operating Expenses			
Purchased Gas Cost	$2698395	$938696	$1759699
Transmission Expense	16166	8083	8083
Sales Promotion Expense	495	—	495
Admin. & Gen. Expense	19929	9668	10261
Subtotal	$2734985	$956447	$1778538
Depreciation	30543	15272	15271
Taxes (other than F.I.T.)[1]	61691	30846	30845
Federal Income Taxes	32278	16139	16139
Return at 6%	68457	34229	34228
Total Cost of Service	$2927954	$1052933	$1875021
Less Cost of Gas	($2698395)	($938696)	($1759699)
Less Gross Receipts Tax	(38914)	(19457)	(19457)
Total Cost of Service Less Gas & G. R. Tax	$190645	94780	95865
Allocation Percents (Resale)[1]		100.0%	67.02%
Resale Cost of Service (excl. Pur. Gas and Gross Receipts Tax)	$159029	$94780	$64249

---

[1] Development of Demand-Commodity Allocation Ratio.

	Annual Sales		3 Day Sustained Peak	
	(MCF)	%	(MCF)	%
Resale Sales	7754322	67.02	154631	100.0
Direct Sales	3815825		—	—
Total Sales	11570147	100.0	154631	100.0

Exhibit 10

Docket No. G-2255

Tennessee Natural Gas Lines, Inc.

Comparison of Resale Cost of Service and Resale Revenues Under Stipulated Rates (1953) (Including and Excluding Tenn. Gross Receipts Tax)

Item	Excluding Tenn. Gross Receipts Tax	Including Tenn. Gross Receipts Tax
COST OF SERVICE		
Cost of Service, Resale (excluding Cost of Gas and Gross Receipts Tax)	$159029	$159029
Cost of Purchased Gas—		
7,754,322 Mcf at 15.35¢	1190288	1190288
506,617 Mcf at $1.80	911911	911911
Gross Receipts Tax	—	30456
Resale Cost of Service	$2261228	$2291684
STIPULATED RATE		
Demand Charge		
First 36,800 Mcf per month of Billing Demand, $ per Mcf	$2.16	$2.20
All Excess Mcf per month of Billing Demand	$1.80	$1.82
Commodity Charge		
	15.4¢	15.6¢
	15.4¢	15.6¢
REVENUES		
Demand Revenue		
36,800 × 12 × ($2.16 — $2.20)	$953856	$971520
65,017 × ($1.80 — $1.82)	117031	118331
7,754,322 × (15.4¢ — 15.6¢)	1194166	1209674
Total Reevnues	$2265053	$2299525

* * * *

216 Received Oct 8 8 51 AM '53
Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
TENNESSEE NATURAL GAS LINES, INC.
DOCKET NO. G-2255

PETITION OF THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE FOR LEAVE TO INTERVENE

Comes now Hammond Fowler, John C. Hammer and Cayce L. Pentecost, Commissioners, constituting the Railroad and Public Utilities Commission of the State of Tennessee, a regulatory agency, having jurisdiction under the laws of the State of Tennessee to regulate rates and charges for the sale of natural gas to customers within the State of Tennessee, and requests that it be permitted to intervene and become a party to this proceeding.

217

I.

That the correct post office address of the person to whom correspondence or communications should be addressed in regard to this proposed intervention is as follows:

General Counsel
Railroad and Public Utilities Commission
State of Tennessee
Nashville, Tennessee

II.

Petitioner states that the proposed gas tariffs of *Tennessee Natural Gas Lines, Inc.*, filed with the Commission, are unjust, unreasonable and are not the lowest rates under which *Tennessee Natural Gas Lines, Inc.* can operate.

III.

That this Commission represents the people of the State of Tennessee, and this State being in an area of high competition with other forms of energy, the various natural gas distributing companies of this State have been placed in a dangerous condition as a result of 218 numerous increases. Further the ultimate consumer of gas eventually pays the entire increases passed on, and in this State there is a limit as to the amount the traffic will bear.

IV.

Wherefore, petitioner prays that it be granted leave to intervene in the above styled cause and asks that it be treated as a party hereto with the right to have notice of and appear at the taking of testimony, to present and cross-examine witnesses and to be heard in person or by counsel upon briefs and oral argument, if such circumstances present themselves.

General Counsel
/s/ Harold Seligman
Assistant General Counsel

219 I hereby certify that I have this day served the foregoing document upon the following:

Tennessee Natural Gas Lines, Inc.
Third National Bank Building
Nashville, Tennessee

by mailing a copy thereof properly addressed.

Dated at Nashville this 6th day of October, 1953.

/s/ Harold Seligman

* * * *

231

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Permitting Intervention

On February 4, 1954, the City of Nashville, Tennessee filed a petition seeking leave to intervene in this proceeding.

The Commission *finds*:

The participation of the City of Nashville, Tennessee may be in the public interest.

The Commission *orders*:

The City of Nashville, Tennessee be and the same hereby is permitted to become an intervener in this proceeding, subject to the rules and regulations of the Commission: *Provided, however,* That the participation of said intervener shall be limited to matters affecting asserted rights and interests specifically set forth in its petition to intervene, and: *Provided, further,* That the admission of said intervener shall not be construed as recognition by the Commission that said intervener might be aggrieved because of any order or orders of the Commission entered in the above-docketed proceeding.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: January 20, 1954
Issued: January 21, 1954

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Making Effective Proposed Rate Schedules Upon Filing of Undertaking to Assume Refund of Excess Charges

Tennessee Natural Gas Lines, Inc. (Tennessee Natural), on August 31, 1953, filed with the Commission Third Revised Sheets Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, whereby it proposed an increase in the rates and charges to its interstate wholesale customer, Nashville Gas Company.

Pending hearing and the Commission's decision upon the question of the lawfulness of the rates proposed by Tennessee Natural, the Commission, on September 24, 1953, issued an order suspending the aforementioned proposed tariff sheets until March 1, 1954, and until such further time thereafter as such proposed tariff sheets might be made effective in the manner prescribed by the Natural Gas Act.

Hearings were commenced on February 15, 1954, and concluded February 19, 1954, pursuant to the Commission's September 24, 1953 order. A decision has not yet been rendered thereon.

On February 24, 1954, Tennessee Natural filed a motion requesting that Third Revised Sheets Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, be permitted to go into effect as of March 1, 1954. An answer objecting to such motion and requesting a hearing thereon was filed on February 26, 1954, jointly by the Railroad and Public Utilities Commission of the State of Tennessee and the City of Nashville.

Section 4(e) of the Natural Gas Act provides that whenever a new rate schedule is filed, the Commission shall have authority to enter upon a hearing concerning the lawfulness of the same; and that pending such hearing and the decision thereon, the Commission may suspend the operation of the new rate schedule, "but not for a longer period than five months beyond the time when it would otherwise go into effect." Said section further provides:

253 "If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

The Commission *finds*:

(1) Good cause has not been shown for providing a hearing on the motion of Tennessee Natural filed on February 24, 1954.

(2) It is appropriate in carrying out the provisions of the Natural Gas Act to prescribe terms and conditions

with respect to refunds by Tennessee Natural as hereinafter provided.

The Commission *orders*:

(A) Upon the execution by Tennessee Natural of the agreement and undertaking described in (C) below and acceptance thereof, evidenced by letter addressed to Tennessee Natural by the Secretary of the Commission, the rates, charges, and classifications set forth in the aforesaid Third Revised Sheets Nos. 4, 6, and 7 to Tennessee Natural's FPC Gas Tariff, Original Volume No. 1, shall be effective as of March 1, 1954, subject to further orders of the Commission in this proceeding.

(B) Tennessee Natural shall refund to those entitled thereto all or the portion of the difference between the increased rates and charges made effective as of March 1, 1954, and those in effect immediately prior thereto, found by the Commission in this proceeding not justified, with interest at the rate of 6% per annum from the date of payment to Tennessee Natural until refunded;
254 shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of the increased rates or charges effective as of March 1, 1954, for each billing period, specifying by whom and in whose behalf such amounts were paid, and shall report in writing and under oath to the Commission monthly for each billing period and for each purchaser the billing determinants of natural gas sales to such purchasers and the revenuues resulting therefrom, as computed under the rates in effect immediately prior to March 1, 1954, and under the rates allowed by this order to become effective, together with the difference in the revenues so computed.

(C) As a condition of this order, within 15 days from the date of issuance of this order, Tennessee Natural shall execute and file with the Secretary of this Commission its written agreement and undertaking to comply with the terms and conditions of paragraph (B) hereof, signed by a responsible officer of the corporation, evidenced by proper authority from the board of directors, as follows:

"In conformity with the requirements of the order adopted ...., in Docket No. G-2255, Tennessee Natural Gas Lines, Inc., hereby agrees and undertakes to comply with the terms and conditions of paragraph (B) of said order and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto, this .... day of ...., 1954.

Tennessee Natural Gas Lines, Inc.
By ....
President

Attest:

....
Secretary"

(D) If Tennessee Natural shall, in conformity with the terms and conditions of paragraph (B) of this order, make the refunds as may be required by order of the Commission, the undertaking shall be discharged, otherwise it shall remain in full force and effect.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: March 17, 1954
Issued: March 18, 1954

255 Received Mar 26 9 39 AM '54
Federal Power Commission

TENNESSEE NATURAL GAS LINES, INC.
Nashville Trust Building
Nashville, Tennessee
Thomas W. Goodloe, President

March 23, 1954

Mr. Leon M. Fuquay, Secretary,
Federal Power Commission,
Washington 25, D. C.

Dear Sir:

Re: Docket No. G-2255

In conformity with the requirements of the order adopted March 17, 1954, in Docket No. G-2255, Tennessee Natural Gas Lines, Inc., hereby agrees and undertakes to comply with the terms and conditions of paragraph (B) of said order and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto, this 23rd day of March, 1954.

Tennessee Natural Gas Lines, Inc.
By ....
President

Attest:

....
Secretary

Received Mar 26 9 39 AM '54

156 The President stated to the Board that on February 24, 1954, the Company had filed with the Federal Power Commission a motion to make effective

as of March 1, 1954, its revised gas tariffs filed with the Commission, which tariffs have been considered by the Commission in F. P. C. Docket G-2255. He stated that if such motion is granted, it will be necessary for the Company to file with the Federal Power Commission an "Undertaking" to refund any portion of the rates collected from its resale customer which the Commission may not finally approve. Thereupon, on motion duly seconded, it was unanimously

RESOLVED, that the President and Secretary of the Company are hereby authorized and directed to file with the Federal Power Commission an Undertaking to Assure Refund of Excess Charges of any amounts collected by it from its resale customer, the Nashville Gas Company, which the Federal Power Commission may find to be excessive and which may result from this Company collecting from the Nashville Gas Company under its Revised Tariffs filed with the Commission and being considered in Docket G-2255 after the effective date of such tariffs and before final determination by the Commission of the lawfulness of the charges provided in such Revised Tariffs.

I hereby certify that the foregoing is a true and exact copy of an excerpt from the Minutes of a meeting of the Directors of Tennessee Natural Gas Lines, Inc., duly called and held on March 18, 1954, at Nashville, Tennessee.

/s/ J. C. Schult
Secretary

March 23, 1954

257 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Providing for the Filing of Just and Reasonable Rates and Charges

This is a rate proceeding arising from a rate increase filed by Tennessee Natural Gas Lines, Inc. (Tennessee Natural). The record herein has been certified to us for determination of a single issue, that of whether the Tennessee Gross Receipts Tax should be included in Tennessee Natural's cost of service, and for approval of a proposed settlement as it affects all other issues of the proceedings. Upon consideration of the record, we determine that the Tennessee Gross Receipts Tax should be excluded from Tennessee Natural's cost of service, provide for the filing of rates and charges which were agreed would properly reflect the exclusion of the Gross Receipts Tax, and approve the terms and conditions of the proposed settlement, as hereinafter set forth.

On August 31, 1953, Tennessee Natural filed Third Revised Sheet Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, providing for an increase of $226,683 annually, or 11.1%, to its affiliate and only resale customer, Nashville Gas Company (Nashville Gas), based on sales for the year ended June 30, 1953.

On September 24, 1953, pending a hearing and our decision upon the question of the lawfulness of the rates proposed by Tennessee Natural, we issued an order suspending the proposed tariff sheets until March 1, 1954, and until such further time thereafter as the proposed tariff sheets might be made effective in the manner prescribed by the Natural Gas Act. By the same order we fixed February 15, 1954, as the date for commencement of hearings in the docket.

By order issued March 18, 1954, the suspended tariff sheets were permitted to become effective as of March 1, 1954, upon the filing of an undertaking and subject to refund, with interest, of the portion of the increased rates and charges which we might find not justified.

Following the convening of the hearings recesses were permitted from day to day during which time conferences were held among representatives of Tennessee Natural, the interveners, City of Nashville, Tennessee and the Railroad and Public Utilities Commission of Tennessee, and the Staff in order to discuss informally 258 the proposed rate increase in an effort to simplify the issues or reach a settlement satisfactory to all parties. At open hearing on February 19, 1954, it was announced that agreement had been reached as to all issues except whether the Tennessee Gross Receipts Tax should be included in the cost of service. Accordingly, it was agreed that alternate rates would be submitted to us reflecting the inclusion and exclusion of the Tennessee Gross Receipts Tax. Also submitted were briefs of the parties on the question at issue.

Section 1248.126 of Williams' Tennessee Code Annotated, 1934 Edition, which provides for the Gross Receipts Tax reads as follows:

"1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the stae for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half per cent (1½%)

of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.

This tax shall not apply to cities or other political subdivisions of the state owning and operating gas companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.

It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.

There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise Tax Law during the calendar year in which the tax hereby levied becomes due."

Since 1947, Tennessee Natural has been paying the Tax on revenues from all sales of the natural gas it transports and sells in interstate commerce. Principal among such sales are those for resale to its wholly owned subsidiary, Nashville Gas. Additionally, the Tax has been paid by Nashville Gas on the receipts from sales Nashville Gas makes in the course of distributing gas in the City of Nashville. Although Tennessee Natural
259 took the position that it was not liable for the Tax
in correspondence with the Office of the Attorney General of the State of Tennessee and in subsequent conferences, it has never contested payment of the Tax in the courts.

From our study of the situation, two conclusions seem abundantly clear. First, there is serious question of the liability of Tennessee Natural for the payment of the

Gross Receipts Tax, and Tennessee Natural has been remiss in failing to contest the matter in the appropriate courts. Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued Tennessee Natural that:

"(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas [Transmission Company] or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.

"(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1), above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned." *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129 (1945)).

To permit the Tax to be included in Tennessee Natural's cost of service would impose on gas consumers in the City of Nashville an added tax and duplicate cost resulting solely from the ownership and operation of the pipe line by a separate corporate entity. As at the time of the Docket No. G-575 proceedings, we find that this is contrary to the public interest. Accordingly, the Gross Receipts Tax must be eliminated in determining Tennessee Natural's cost of service.

Tennessee Natural's net investment rate base as compared by the Staff for the year 1953 was $1,140,956. Allowing a 6% rate of return upon this rate base, and eliminating the $38,914 net effect of the Tennessee Gross Receipts Tax, the overall total cost of service is $2,889,040, of which $2,261,228 is allocable to jurisdictional sales.

260 The rate alternate which reflects the exclusion of the Tennessee Gross Receipts Tax is as follows:

Type of Service	Rate Schedule	Demand Charge Per Mcf	Commodity Charge Per Mcf
General Service	G-1	$2.16 for the first 36,800 Mcf of Billing Demand $1.80 for all Excess Mcf per Month of Billing Demand	15.4 cents

These rates would produce revenues of approximately $2,265,000 for the test year.

The Commission *finds*:

(1) The Tennessee Gross Receipts Tax is not a proper item for inclusion in Tennessee Natural's cost of service.

(2) Tennessee Natural's just and reasonable rates and charges are those agreed upon by parties to these proceedings as properly reflecting the exclusion of the Tennessee Gross Receipts Tax from Tennessee Natural's cost of service, and subject to the terms and conditions hereinafter ordered, it is appropriate and in the public interest in carrying out the provisions of the Natural Gas

Act that such rates and charges should be approved and made effective as hereinafter provided and ordered.

(3) The public interest requires that the following terms and conditions shall attach to this order:

(a) Tennessee Natural shall refund to Nashville Gas the difference between the amounts collected under the rates in effect subject to an undertaking and the amounts which would have been collected by the application of the rates and charges provided for herein, to the billing units which accrued during the period in which rates were collected subject to an undertaking plus interest at a rate of six per cent per annum computed to the date of refund.

(b) In the event that the actual Federal income tax, payable by Tennessee Natural, is fixed at less than the rate of 52 per cent after December 31, 1953, Tennessee Natural shall file revised rate schedules within 30 days, which will reflect such decrease. In such revised rate schedules, the demand charge of the first block shall
261 be reduced by 0.1 cent per Mcf for each 1 per cent
of reduction in the Federal income tax rate below 52 per cent. Additionally, Tennessee Natural shall make appropriate refunds from revenues collected under the rates and charges provided for in this proceeding, or as may become final in any court review or otherwise.

(c) Any increase in the cost of natural gas purchased by Tennessee Natural from its supplier, Tennessee Gas Transmission Company (TGT), above the rates of $1.80 per Mcf of billing demand per month and a commodity charge of 15.35 cents per Mcf (at 15.025 psia), which may be made effective by TGT before December 31, 1954 for deliveries to Tennessee Natural, may be passed on by Tennessee Natural upon the following conditions:

(i) Tennessee Natural may file revised tariff sheets with the Commission reflecting an identical increase in the demand component of its then effective rate as that proposed by TGT and/or an identical increase in the commodity component of its then effective rate as that proposed by TGT together with such other revised sheets to Tennessee Natural's then effective FPC Gas Tariff as would necessarily change as a result of an increase in the demand and/or commodity charges.

(ii) The revised tariff sheets of Tennessee Natural will bear the same proposed effective date as that proposed by TGT.

(iii) Requirements of Section 154.63(b)(iii) of the Commission's Rules and Regulations shall be satisfied by including in the rate increase a filing reference to the cost data submitted in this proceeding.

(iv) The increase in rates as proposed by Tennessee Natural will follow the same procedural route as the filing of Tennessee Gas Transmission, TGT; that is, suspension dates, bond dates and effective dates.

(v) The filing by Tennessee Natural will be revised to reflect only the increase, if any, which may be in order by the Commission in any final order which is put into effect by TGT resulting from the proceedings relating to the proposed increase which may become final in any court review or otherwise. In this event, Tennessee Natural will file revised sheets to reflect the identical increase in the demand and commodity components as described in (i) above.

262 (d) If as a result of any order entered by the Commission in the matter of Tennessee Gas Transmission Company, Docket Nos. G-2052 and G-2252, Tennessee Natural's supplier, TGT, shall file revised rate schedules which are made effective and result in any reduction on or after March 1, 1954, in the rate of $1.80 per each Mcf of billing demand per month and the com

modity charge of 15.35 cents per Mcf (at 15.025 psia), Tennessee Natural shall file with the Commission, within 30 days, changes in its rate schedule to reduce its rates identically to the reduction in the demand and/or commodity components reflected in the rates of TGT, and to be effective on the same date as the revised and reduced rates of TGT become effective.

If, as the result of any Commission order entered in the aforesaid proceeding in Docket Nos. G-2052 and/or G-2252, TGT shall make any refunds to Tennessee Natural, then Tennessee Natural shall refund, within 30 days after the receipt thereof, such portion as relates to its sales to its jurisdictional customer after March 1, 1954.

(e) If the rates of TGT are increased solely for the purpose of recouping a production or gathering tax which might be enacted by the State of Texas as a substitute for the invalidated gathering tax, provided that the increase requested by TGT does not exceed 0.35 cents per Mcf, and such increase is passed on to Tennessee Natural, then Tennessee Natural will be permitted to pass on such increase to its jurisdictional customer. If any such tax is invalidated and Tennessee Natural, as a result of such invalidation, receives a refund from TGT, then Tennessee Natural shall pass on to its jurisdictional customer within 30 days such portion of the refund as relates to the sales to the jurisdictional customer.

The Commission *orders*:

(A) Tennessee Natural shall, within thirty (30) days after the date of issuance of this order, file a revised General Service Rate Schedule G-1, in a form satisfactory to the Commission, superseding the afore-mentioned Third Revised Sheet Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1. Such General Service Rate Schedule G-1 shall contain a rate consisting of a demand charge of $2.16 per Mcf for the first 36,800 Mcf of billing demand per month and $1.80 per Mcf for all excess Mcf of billing demand per month above the first 36,800 Mcf per month, and a commodity charge of 15.4 cents per Mcf of gas delivered.

263 (B) Within ten (10) days of the issuance of the Commission's order accepting for filing the revised General Rate Schedule G-1 described in (A) above, Tennessee Natural shall submit the details of its calculations reflecting the refund ordered pursuant to Finding (2)(a) and copies of a release from Nashville Gas with respect to such refund.

(C) This order is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Tennessee Natural.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: April 14, 1954
Issued: April 16, 1954

264 Received May 12 10 01 AM '54

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Application for Rehearing and for Stay of Order and for Other Relief and for Oral Argument

Phil B. Whitaker
Whitaker, Hall & Haynes
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Attorney for Tennessee Natural Gas Lines, Inc.

May 8, 1954

865 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Application for Rehearing and for Stay of Order and for Other Relief and for Oral Argument

Comes now Tennessee Natural Gas Lines, Inc. (Tennessee Natural) and, pursuant to Section 19 of the Natural Gas Act and to the Rules of Practice and Procedure of the Federal Power Commission, hereby applies for rehearing and stay of the Commission's order issued in the captioned proceeding on April 16, 1954, fixing rates for Tennessee Natural based upon an elimination from its cost of service of the payment by Tennessee Natural of the Tennessee Gross Receipts Tax. Tennessee Natural requests an immediate stay of said order because compliance with it may result in Tennessee Natural being allowed to earn only a 3.2% return on its investment. Exhibit I in the record on which the order is based shows that Tennessee Natural's outstanding mortgage bonds bear interest at 3¼% and its Debentures carry interest at 4½%. With such an interest cost a 3.2% return on the entire investment means a return of less than
266 3% on the book value of the Company's common stock equity, which return is clearly confiscatory.

In support hereof, it is respectfully submitted that the Commission erred in the following particulars and for the following reasons:

I.

For the reasons hereinafter set forth, the Commission erred in excluding from the cost of service of Tennessee Natural the amount of money which Tennessee Natural is required to pay to the State of Tennessee in the form of the Tennessee Gross Receipts Tax. Section 1248.126 of Williams Code of Tennessee, as amended, is the statute enacting said Gross Receipts Tax. The portions of this statute pertinent to this proceeding are as follows:

"1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the state for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half per cent (1½%) of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.

This tax shall not apply to cities or other political subdivisions of the state owning and operating gas companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.

267 It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.

There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise Tax Law during the calendar year in which the tax hereby levied becomes due."

Tennessee Natural has been paying this tax to the State of Tennessee, as demanded by the taxing officials, since the year 1948 (Tr. 82). Tennessee Natural will again be required to pay this tax when it falls due on August 1, 1954. The tax amounts to approximately $40,000.00.

Tennessee Natural has not paid this tax voluntarily, but through compulsion and to avoid a levy by the State of Tennessee on its property. The record shows that Tennessee Natural vigorously took the position that it was not liable for the tax. (Tr. 65-72). The record further shows that the Attorney-General of the State just as vigorously insisted that the Applicant was liable for the Tax. (Tr. 73-79). This argument began in January 1948, and did not end until Tennessee Natural yielded to the State's demands and paid the tax on or about August 1, 1948.

We respectfully submit that this Commission cannot lightly brush aside the opinion of the Attorney-General of Tennessee, particularly when the Attorney-General is construing a statute of his own State. The Attor-
268 ney-General of Tennessee is not a political office, *since this official is not elected by the people,* as is the Attorney-General in most of the states. *On the contrary, he is selected by the Justices of the Supreme Court of Tennessee.* Section 642, Code of Tennessee. By statute, the Attorney-General is required "to give to the officers of the State when called on written legal opinions on all matters submitted by them in the discharge of their official duties. Section 9956(6), Code of Tennessee."

The propriety of including the Gross Receipts Tax in Tennessee Natural's cost of service has never been questioned by the Federal Power Commission, except in this proceeding. When the matter arose, Tennessee Natural offered on the record, and again in its Briefs renewed the offer, and here and now renews it again, to pay this tax under protest when it again becomes due on August 1, 1954, and to sue to recover the amount so paid. This is the exclusive remedy provided by Tennessee law to the taxpayer in such situations. *Tennessee Natural further offered on the record, and again renews the offer, to conduct this litigation wholly at its own expense, to refund to its resale customer any amount which it may obtain as a result of this litigation, and to reduce its rates accordingly.*

Therefore, we most respectfully submit that the Commission erred in refusing to permit Tennessee Natural to include in its cost of service the amount which it has been required to pay in satisfaction of the Tennessee Gross Receipts Tax.

269 II.

The Commission erred in failing to grant to Tennessee Natural a fair rate of return, which is its *absolute right under the provisions of the Natural Gas Act.*

The record shows without any contradiction that the rates fixed by the Commission in its order issued April 16, 1954 (excluding the Gross Receipts Tax from the cost of service) yields to Tennessee Natural a rate of return of only 3.2%. The undisputed figures taken from the record are set out in convenient tabulated form in Appendix A to our initial brief, to which we respectfully refer the Commission. We submit that no court has ever held, and that the Commission has never held, that 3.2% is a fair rate of return. This return is less than the cost of Tennessee Natural's debt money. With all respect to the Commission, we assert that fixing such a rate of return amounts to confiscatory regulation. In a brief filed by Commission Staff on April 22, 1954 in the matters of Tennessee Gas Transmission Company, Docket No. G-2352, and Northeastern Gas Transmission Company. Docket No. G-2353, the Staff said at page 9:

> "The rate of return for Northeastern in 1953 can be computed from figures supplied in various exhibits (R. 70-71) and is approximately 3%."

Thereupon, the writer of the brief referred to this rate of return as a "serious deficiency."

In *Colorado Interstate Gas Co. vs. Federal Power Commission,* 209 Fed. 2d, 717, the Court among other 270 things said at Page 724:

> "The primary purpose of the Natural Gas Act was to protect the users of gas against exorbitant exactions at the hands of the natural gas companies *and, on the other hand, assure to them the right of a fair return from their operations.*"

And again at Page 727 the Court said:

> "Conversely, if the total overall effect of the rate order is to deprive the utility of the opportunity to earn a fair return, it cannot stand."

We quoted from the above case at length in our reply brief filed on March 29, 1954, and it would seem that the Commission either disregarded or overlooked this authority, which we submit is controlling under the circumstances involved in this proceeding.

III.

The Commission erred in holding on Page 3 of its order as follows:

". . . Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued Tennessee Natural that:

'(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost of transportation of the gas over a
271 distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.

'(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1), above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned.' *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129) (1945.)"

This is error because the restrictions imposed upon the certificate granted to Tennessee Natural in Docket No. G-575 (4 F.P.C. 1127, 1129) quoted above, violate the provisions of the Natural Gas Act. The Commission has no powers except those granted to it by the provisions of the Natural Gas Act. A certificate of public convenience and necessity cannot be issued to any applicant therefor except pursuant to the provisions of said Act. This Act specifically guarantees that the recipient of a certificate is entitled to rates which are "just and reasonable." Uniformly, "just and reasonable" rates have been declared by the Commission and the courts to be rates that yield a fair rate of return on the investment. The rate of return which the Commission has allowed is only 3.2%, which is less than Tennessee Natural's cost of debt money.

272 As said by the Court of Appeals in *Colorado Interstate Gas Company vs. Federal Power Commission,* supra:

"If the total overall effect of the rate order is to deprive the utility of the opportunity to earn a fair return, it cannot stand." (Page 727).

And further on the same page of this opinion, the Court said:

"A rate based upon the exclusion from the cost of service, no matter for what reason, of a substantial amount of admitted operative cost does not and cannot reach a just end result and may, therefore, not stand."

We quoted fully from and commented upon the above case in our reply brief, pages 14 to 18, inclusive. We will not here repeat what was there said, except to say that in that case the Commission attempted to exclude from Colorado Interstate's cost of service an item based upon a previous order of the Commission approving the merger of Colorado Interstate with another company. As said by the Court of Appeals:

"The provision in the merger order that such operative costs as we are considering here should be eliminated from the cost of service base in subsequent rate hearings does not alter these basic principles. When that proceeding was before the Commission, *it was its*

statutory duty to determine whether the plan was fair and just to Colorado's gas users. If it found that it might result in an unjust burden on them, it had power to disapprove it. It could not predicate its approval thereof upon a condition which it could not adopt in a rate hearing and which would thereafter deprive Colo-
273 rado of the opportunity to earn a fair return upon its investment." (Emphasis added)

Furthermore, the Commission seems to have completely ignored the fact, as pointed out in our reply brief, that five years after Tennessee Natural was granted its certificate in Docket No. G-575 it was granted another certificate in Docket No. G-1381 (9 F.P.C. 912) under the terms of which it was permitted to construct and operate facilities far more extensively than those authorized in the G-575 certificate. Nowhere in this later certificate are such restrictions found as those contained in Items 9 and 10 in the G-575 certificate, quoted above.

We earnestly submit that the Commission should either have denied a certificate to Tennessee Natural in the G-575 proceeding, or have issued the certificate in entire compliance with the provisions of the Natural Gas Act, one of the essential provisions of which is that a natural gas company is entitled to a fair rate of return on its investment.

IV.

It may be urged that in this petition to rehear we have made no argument which was not made in our initial brief and our reply brief; however, we think we have definitely pointed out matters which were over-
274 looked by the Commission in its order issued April 16, 1954. This order makes no mention of the holding of the Court of Appeals in *Colorado Interstate*

vs. Federal Power Commission, supra, nor does it make any reference to the fact that there were no restrictive provisions contained in the G-1381 certificate (9 F.P.C. 912).

We most earnestly and respectfully submit that the issues presented by this proceeding are so fundamental, and involve such basic principles which are sought to be achieved by the Natural Gas Act, that the Commission should set the matter down for oral argument and give to Tennessee Natural an opportunity to be heard on these questions by the entire Commission.

WHEREFORE, for all of the foregoing reasons set forth herein, Tennessee Natural respectfully requests that:

(A) Oral argument be granted.

(B) The Commission amend its order of April 16, 1954, and permit Tennessee Natural's proposed stipulated rate, which includes the Tennessee Gross Receipts Tax in its cost of service, as follows:

Demand Charge	
First 36,800 mcf per month of billing demand, $ per mcf	$2.20
All excess mcf per month of billing demand	$1.82
Commodity Charge	
¢ per mcf	15.6¢

to become effective as of April 16, 1954.

275 (C) Pending final decision by the Commission on this application, the Commission stay the order of April 16, 1954.

(D) The Commission grant to Tennessee Natural such other and further relief as may be appropriate in the premises.

Respectfully submitted,

TENNESSEE NATURAL GAS LINES, INC.
By /s/ Thomas W. Goodloe
President

/s/ Phil B. Whitaker
Phil B. Whitaker
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Attorney for Tennessee
Natural Gas Lines, Inc.

Whitaker, Hall & Haynes
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Of Counsel

May 8, 1954

276 STATE OF TENNESSEE:
COUNTY OF DAVIDSON:

THOMAS W. GOODLOE, being first duly sworn, deposes and says that: he is President of Tennessee Natural Gas Lines, Inc.; that as such he has duly executed the foregoing Application for Rehearing and for Stay of Order and for Other Relief and for Oral Argument; that he is authorized so to do; that he has read the foregoing Application and is familiar with the contents thereof; and that the same are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

/s/ Thomas W. Goodloe
Thomas W. Goodloe

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 8th day of May, 1954.

/s/ Dorothy B. Sawyers
Notary Public

My Commission Expires: January 25, 1958.

277 *Certificate of Service*

I hereby certify that I have this day served the foregoing *APPLICATION FOR REHEARING AND FOR STAY OF ORDER AND FOR OTHER RELIEF AND FOR ORAL ARGUMENT* upon all parties of record in this proceeding by mailing a copy thereof properly addressed to:

Honorable Hammond Fowler, Chairman
Tennessee Railroad and Public Utilities Commission
Nashville, Tennessee
W. H. Ligon, President

Nashville Gas Company
800 Church Street
Nashville, Tennessee

Benson Trimble
Assistant City Attorney, City of Nashville
537 Third National Bank Building
Nashville 3, Tennessee

Dated at Chattanooga, Tennessee, this 8th day of May, 1954.

/s/ Phil B. Whitaker
Phil B. Whitaker
Attorney for Tennessee
Natural Gas Lines, Inc.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Denying Application for Rehearing, Stay of Order, Other Relief and Oral Argument

On May 12, 1954, Tennessee Natural Gas Lines, Inc. filed an application for rehearing, stay of order, other relief and oral argument with respect to the Commission's order issued April 16, 1954 in this proceeding.

The Commission *finds*:

The application of Tennessee Natural Gas Lines, Inc. filed May 12, 1954 has presented or alleged no new facts and has set forth no new principles of law which either were not fully considered by the Commission before it adopted its order issued April 16, 1954 herein, or having now been considered, warrant any modification or change in said order.

The Commission *orders*:

The application for rehearing, stay of order, other relief and oral argument filed by Tennessee Natural Gas Lines, Inc. on May 12, 1954 in this proceeding be and the same is hereby denied.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: May 26, 1954
Issued: May 27, 1954

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Extending Time for Filing Rate Schedule

By "Notice of Extension of Time" of May 13, 1954, in the above-entitled matter, Tennessee Natural Gas Lines, Inc., was given an extension of time to and including June 1, 1954, within which to file its Revised General Service Rate Schedule G-1 in a form satisfactory to the Commission as required by Paragraph (A) of the order issued April 16, 1954, in the above-entitled matter.

On June 1, 1954, Tennessee Natural Gas Lines, Inc., filed a petition in the United States Court of Appeals for the District of Columbia Circuit (No. 12,249) for review of the Commission's order issued April 16, 1954, and applied to the said court for a stay of the said order of April 16, 1954, pending final determination of the petition for review.

Pending disposition by said Court of the application for stay, it is appropriate that the time within which Tennessee Natural Gas Lines, Inc., shall file its revised rate schedule in accordance with Paragraph (A) of said order of April 16, 1954, be further extended.

The Commission *orders*:

The time within which Tennessee Natural Gas Lines, Inc., shall file the revised rate schedule in accordance with the provisions of Paragraph (A) of the Commission's order issued April 16, 1954, in the above-entitled matter be and the same is hereby extended to June 16, 1954.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: June 1, 1954
Issued: June 1, 1954

283 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of
Tennessee Natural Gas Lines, Inc.

Docket No. G-2255

Order Staying the Effect of Order Providing for the Filing of Just and Reasonable Rates and Charges, Providing for the Filing of Substitute Tariff Sheets Subject to an Undertaking and Providing for the Refund of Excess Charges.

Tennessee Natural Gas Lines, Inc. (Tennessee Natural), on August 31, 1953, filed Third Revised Sheet Nos. 4, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, providing for rates which if applied to its 1953 sales would result in a rate increase of $236,672. Following the statutory period of suspension, the Commission's order issued March 18, 1954, permitted such rates to become effective as of March 1, 1954, subject to the filing of an undertaking.

During the suspension period conferences and hearings were held on the proposed rate increase and as a result thereof it was agreed that there be submitted to the Commission alternate rates reflecting the inclusion and exclusion in the cost of service of the item of Tennessee's Gross Receipts Tax, this being the single issue remaining in dispute. The inclusion of the Gross Receipts Tax would result in a rate increase in the amount of $193,613 based on 1953 sales as compared to the $236,672 increase originally requested. The exclusion of the Tax would result in an increase of $159,141. By its order issued April 16, 1954, the Commission required Tennessee Natural to file within 30-days of the issuance of the order a revised rate schedule containing the rates which reflected the exclusion of the Tennessee Gross Receipts Tax from the cost of service. Upon request of Tennessee Natural the time for filing the rate schedule was first extended to and including June 1, 1954, and then until June 16, 1954.

On May 12, 1954, Tennessee Natural filed with the Commission an Application for Rehearing and for Stay and for Other Relief and for Oral Argument. Said application was denied by the Commission's order issued May 27, 1954.

Subsequently, on June 1, 1954, Tennessee Natural petitioned the United States Court of Appeals for the District of Columbia Circuit for review and stay of the Commission's order issued April 16, 1954. Objections were filed to the stay by the Commission, and following oral argument on June 11, 1954, the Court 284 stated its opinion from the bench that the Commission's order should be stayed in such fashion that the rates to be effective during the pendency of litigation on the review should be the rates which had been submitted to the Commission as reflecting the inclusion in the cost of service of the Tennessee Gross Receipts Tax and generating the $193,613 increase, rather than those presently in effect under bond.

The Commission *finds*:

(1) It is appropriate that the Commission's order issued April 16, 1954, providing for the filing of just and reasonable rates and charges by Tennessee Natural be stayed until further Commission order pending the outcome of Tennessee Natural's petition for review thereof filed with the United States Court of Appeals for the District of Columbia Circuit.

(2) It is appropriate that Tennessee Natural, pending the outcome of its petition for review of the Commission's April 16, 1954, order, should file, in lieu of Third Revised Sheets Nos. 4, 6 and 7 to its FPC Gas Tariff, Original Volume No. 1, now in effect subject to an undertaking to assure the refund of excess charges, new tariff sheets to be effective as of March 1, 1954, containing the following rates and charges:

Demand Charge	
First 36,800 Mcf per Month of Billing Demand, $ per Mcf	$2.20
All excess Mcf per Month of Billing Demand, $ per Mcf	1.82
Commodity Charge	
Cents per Mcf	15.6

(3) It is appropriate that the filing of the new tariff sheets provided for in (2) above be accompanied by an undertaking covering the conditions and executed in the form hereinafter ordered to assure the refund of such excess charges as may accrue from March 1, 1954, until the effective date of such tariff sheets as may be filed in compliance with any final order rendered pursuant to the outcome of judicial review in these proceedings.

285 (4) It is appropriate that Tennessee Natural shall refund to Nashville Gas Company (Nashville Gas) the difference between the amounts collected under

the rates in effect subject to an undertaking by reason of the Commission's order issued March 18, 1954, and the amounts which would have been collected by the application of the rates and charges provided for in Finding (2) above, to the billing units which accrued during the period in which rates were collected subject to an undertaking plus interest at a rate of six per cent per annum computed to the date of refund.

The Commission *orders*:

(A) The provision of the Commission's order issued April 16, 1954, in this docket, requiring the filing by Tennessee Natural of certain rates and charges set forth therein, be and the same is hereby stayed pending the outcome of Tennessee Natural's petition for review thereof filed with the United States Court of Appeals for the District of Columbia Circuit.

(B) Tennessee Natural shall file within 10 days of the issuance of this order new tariff sheets containing the rates and charges set forth in Finding (2) above, and shall within 15 days thereafter make the refunds provided in Finding (4) above.

(C) Tennessee Natural shall refund to those entitled thereto the difference between the rates and charges filed in compliance with paragraph (B) above and the rates and charges contained in the Commission's April 16, 1954 order if the United States Court of Appeals for the District of Columbia Circuit affirms the Commission's order of April 16, 1954. Such refund shall be with interest at the rate of 6% per annum from the date of payment to Tennessee Natural until refunded. Tennessee Natural shall bear all costs of any such refunding, including the costs of such refunding as the Railroad and Public Utilities Commission of the State of Tennessee may order made by Nashville Gas; shall keep accurate accounts in

detail of all amounts received by reason of the rates or charges filed in compliance with paragraph (B) above for each billing period specifying by whom and in whose behalf such amounts were paid, and shall report in writing and under oath to the Commission monthly for each billing period and for each purchaser the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom, as computed under
286 the rates contained in the Commission's order is-
sued April 16, 1954, and the rates filed in compliance with paragraph (B) above, together with the difference in revenues so computed.

(D) As a condition of this order, Tennessee Natural, concurrently with the filing of new tariff sheets provided in paragraph (B) shall execute and file with the Secretary of this Commission its written agreement and undertaking to comply with the terms and conditions of paragraph (C) hereof, signed by a responsible officer of the corporation, evidenced by proper authority from the board of directors, as follows:

"In conformity with the requirements of the order adopted June 16, 1954, in Docket No. G-2255, Tennessee Natural Gas Lines, Inc., hereby agrees and undertakes to comply with the terms and conditions of paragraph (C) of said order and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto, this .... day of ...., 1954.

Tennessee Natural Gas Lines, Inc.
By ....
President

Attest:

....
Secretary"

(E) If Tennessee Natural shall, in conformity with the terms and conditions of paragraph (C) of this order, make the refunds as may be required by order of the Commission, the undertaking shall be discharged, otherwise it shall remain in full force and effect.

(F) Within ten (10) days of the making of refunds in compliance with paragraph (B) above, Tennessee Natural shall submit the details of its calculations reflecting the refund ordered pursuant to Finding (4) above and copies of a release from Nashville Gas with respect to such refund.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: June 16, 1954
Issued: June 17, 1954

No. 12,249

BRIEF FOR PETITIONER

In The

United States Court of Appeals

For the District of Columbia Circuit

Tennessee Natural Gas Lines, Inc., *Petitioner*

v.

Federal Power Commission, *Respondent*
Tennessee Railroad and Public Utilities Commission,
City of Nashville, *Intervenors*

Petition to Review Federal Power Commission Order

Phil B. Whitaker
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Attorney for Petitioner

Of Counsel
Whitaker, Hall & Haynes
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee

United States Court of Appeals
For the
District of Columbia Circuit
FILED AUG 20 1954
Joseph W. Stewart
CLERK

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No. 12,249

STATEMENT OF QUESTION PRESENTED

This case involves a review of a rate proceeding before the Federal Power Commission wherein Petitioner seeks to increase its rates. The sole question presented for the Court's decision is:

Should the Petitioner in this proceeding, Tennessee Natural Gas Lines, Inc., be permitted to include in its cost of service for the test year its liability for the Tennessee Gross Receipts Tax imposed by Section 1248.126 of Williams Code of Tennessee, as Amended (now codified in Section 1248.3, Item H, of the Supplement to the Code of Tennessee) upon persons engaged in the business of distributing natural gas, the same being a privilege tax payable on or before August 1 of each year, and measured by 1½% of its gross receipts on sales made during the preceding twelve months ended June 30?

INDEX

PAGE

STATEMENT OF QUESTIONS PRESENTED Frontispiece

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 3

STATUTES INVOLVED 9

STATEMENT OF POINTS 11

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. DESCRIPTION OF PETITIONER'S FACILITIES 15

II. PETITIONER HAS BEEN FORCED TO PAY THE TENNESSEE GROSS RECEIPTS TAX SINCE THE YEAR 1948 17

III. UNDER THE NATURAL GAS ACT, PETIONER HAS THE ABSOLUTE RIGHT TO INCLUDE IN ITS COST OF SERVICE THE TENNESSEE GROSS RECEIPTS TAX WHICH IT PAYS 22

IV. A 3.2% RATE OF RETURN IS NOT A "FAIR RATE OF RETURN" AND DOES NOT PROVIDE FOR "JUST AND REASONABLE RATES" AS PROVIDED BY THE NATURAL GAS ACT 28

CONCLUSION 29

Table of Cases

Badger v. Hoidale, 88 Fed. 2d. 208 18

Central Greyhound Lines v. Mealey, 334 U.S. 653; 92 L. Ed. 1633 20

Colorado Interstate Gas Company v. Federal Power Commission, 209 Fed. 2d, 717 25, 26, 27, 28

Colorado Interstate Gas Company v. Federal Power Commission, 324 U. S. 581; 89 L. Ed. 1206 27

Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464; 94 L. Ed., 268 19

PAGE

Memphis Natural Gas Company v. McCanless, 180 Tenn., 688; 177 S.W. 2d, 841 .... 19, 21

Southern Natural Gas Corp. v. Alabama, 301 U. S., 148; 81 L. Ed., 970 20

State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41; 76 L. Ed. 156 19

In re: Tennessee Natural Gas Lines, Inc., 4 FPC, 1127 .... 12, 14, 15, 23, 24

In re: Tennessee Natural Gas Lines, Inc., 9 FPC, 912 .... 14, 15, 23

Statutes

Williams Code of Tennessee
  Section 1248.126
  (Supplement to the Code of Tennessee, 1248.3) 5, 7, 9, 10

Supplement to the Code of Tennessee
  Sections 1248.5 to 1248.8.11, inc. 7, 17

Williams Code of Tennessee
  Sections 1790 to 1799 .... 8, 17

Williams Code of Tennessee
  Section 642 18

Williams Code of Tennessee
  Section 9956 (6) 18

Act of June 21, 1938—Natural Gas Act
  Section 4 (a), 15 U.S.C. 717 c (a) 10

  Section 19 (b), 15 U.S.C. 717 r 10

Act of June 11, 1946—Administrative Procedure Act
  Section 10 (a), 5 U.S.C. 1009 (a) 11

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,249

TENNESSEE NATURAL GAS LINES, INC., *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
TENNESSEE RAILROAD AND PUBLIC UTILITIES COMMISSION,
CITY OF NASHVILLE, *Intervenors*

Petition to Review Federal Power Commission Order

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

The Order which the Petitioner desires to have reviewed, set aside and/or modified was adopted by the Federal Power Commission (hereinafter referred to as the "Commission") on April 14, 1954, and issued April 16, 1954, after hearings in Docket No. G-2255, which hearings concluded on February 19, 1954. The Tennessee

Railroad and Public Utilities Commission (hereinafter sometimes called "Tennessee Commission") and the City of Nashville (hereinafter sometimes called "Nashville") were both intervenors in the hearing before the Commission. (App. 67A and App. 69A) and both are intervenors here. The proceeding before the Commission involved the filing of revised tariffs by Petitioner, the purpose of which was to increase the rates at which it sold natural gas, subject to the jurisdiction of the Commission. Petitioner being "aggrieved" by the Commission's Order issued April 16, 1954, applied to the Commission for a rehearing within thirty (30) days after the issuance of such order. (App. 85A). The application for rehearing set forth objections to the Order. (App. 84A). Within thirty (30) days thereafter, the Commission denied the application for rehearing. (App. 96A). On June 1, 1954, which was within sixty (60) days after the application for rehearing was denied, the Petitioner filed a written petition requesting this Court (1) to stay the Commission's Order pending review in this proceeding, and (2) to review the Commission's Order issued April 16, 1954, and upon such review, to set aside and/or modify such Order. (App. 2A). Objections to the application for a stay of the Commission's Order were filed by the Respondent on June 7, 1954. An answer was filed by the intervenor, Tennessee Commission, on or about June 6, 1954, and an answer by the intervenor, Nashville, was filed on or about June 5, 1954.

The application for the stay of the Commission Order was orally argued before this Honorable Court on June 11, 1954. After argument, the Court stated its opinion from the bench that the Commission's Order should be stayed in such fashion that the rates to be effective during the pendency of litigation on the review should be the rates which had been submitted to the Commission as reflecting the inclusion in the cost of service of Petitioner of the Tennessee Gross Receipts Tax rather than those then in effect under an undertaking to make refund.

Following this action by the Court, the Commission on June 16, 1954, adopted an Order which was issued on June 17, 1954, granting to Petitioner the relief which it sought in the stay of the Commission's Order. (App. 98A). Consequently, Petitioner filed a motion for leave to withdraw its application for a stay of the Order, which motion was granted by order of the Court on July 23, 1954.

After service of a copy of such petition upon a member of the Commission, the Commission certified and filed with this Court on July 12, 1954, a transcript of the record upon which the Order complained of was entered.

The jurisdiction of this Court is sustained by Section 19 (b) of the Natural Gas Act of June 21, 1938, as Amended, 15 U.S.C. 717r and by Section 10 (a) of the Administrative Procedure Act of June 11, 1946, 5 U.S.C., Section 1009.

STATEMENT OF THE CASE

On August 31, 1953, Petitioner tendered to the Commission Petitioner's Third Revised Sheets, Nos. 4, 6 and 7 to its F.P.C. Gas Tariff, Original Volume I, seeking an increase in its resale rates to its only resale customer, the Nashville Gas Company, all of the stock of which company is owned by Petitioner. (App. 53A).

The Commission suspended the proposed tariff sheets until March 1, 1954, and ordered the hearing commencing February 15, 1954.

On March 18, 1954, the Commission entered its order making effective said suspended tariff sheets as of March 1, 1954, upon the filing of an undertaking to make refund with interest of the portion of the increased rates and charges which might not be found to be justified. (App. 70A).

On March 23, 1954, Petitioner did file with the Commission the required undertaking to make refund. (App. 74A).

On February 15, 1954, the hearing before the Commission was convened and recesses were permitted from day to day in an effort to reach an agreement or to simplify the issues.

The hearing concluded on February 19, 1954, at which time it was announced that an agreement had been reached as to all issues except whether the Tennessee Gross Receipts Tax (Section 1248.126 of Williams Code of Tennessee, As Amended) should be included in Petitioner's cost of service. (App. 27A). It was agreed that alternate rates should be submitted to the Commission reflecting the inclusion and the exclusion of said tax. The Commission offered in evidence Exhibit 10 which was received (App. 66A) and which was titled "COMPARISON OF RESALE COST OF SERVICE AND RESALE REVENUES UNDER STIPULATED RATES (1953) (INCLUDING AND EXCLUDING TENNESSEE GROSS RECEIPTS TAX)". The figures in the left hand column of said Exhibit are under the heading, "Excluding Tenn. Gross Receipts Tax" and the figures in the right hand column are under the heading, "Including Tenn. Gross Receipts Tax." The following is copied from this Exhibit:

STIPULATED RATE		
DEMAND CHARGE		
First 36,800 mcf per month of billing demand, $ per mcf	$2.16	$2.20
All excess mcf per month of billing demand	1.80	1.82
COMMODITY CHARGE		
¢ per mcf	15.4¢	15.6¢

By its order of April 16, 1954, (App. 76A) the Commission excluded from Petitioner's cost of service the Tennessee Gross Receipts Tax and ordered that the stipulated rates in the left hand column quoted above should take effect within thirty (30) days of the issuance of the Order.

On May 12, 1954, Petitioner filed with the Commission an Application for Rehearing, for Stay of the Commission Order and for Oral Argument. On the same day, Petitioner by telegram, requested an extension of time of an additional thirty (30) days within which to file its gas tariffs pursuant to the Order of the Commission as aforesaid.

On May 13, 1954, the Commission issued its "Notice of Extension of Time" under the terms of which Petitioner was given an extension of time to and including June 1, 1954, within which to file its Revised General Service Rate Schedule G-1, in a form satisfactory to the Commission, as required by the Order issued by the Commission on April 16, 1954. (App. 76A).

On May 27, 1954, the Commission issued its Order denying the Petition to Rehear, denying the requested Stay of the Order, and denying Oral Argument. (App. 96A).

The sole question at issue in this proceeding is whether or not the Commission erred in refusing to permit the Petitioner to include in its cost of service the payment of the Tennessee Gross Receipts Tax. This tax is found at Section 1248.126 of Williams Code of Tennessee, As Amended, and the pertinent part is quoted under the heading "Statutes Involved" at pages 9 and 10 of this brief.

Petitioner has been paying this tax to the State of Tennessee, as demanded by the taxing officials, since the year 1948. The tax will again be demanded by the taxing officials of Tennessee when it falls due on August 1, 1954. The tax now amounts to approximately $40,000 a year.

(App. 64A). The Tennessee Gross Receipts Tax is a tax *on the privilege of doing business* in the State of Tennessee for the twelve month period beginning on July 1 of each year and is measured by one and one-half (1½%) percent of the gross receipts of companies subject to the tax for the preceding twelve months' period ended on June 30 of each year.

When the question of Petitioner's liability for this tax first arose in the year 1948, Petitioner took the position that it was not liable for the tax for the following reasons: (1) that Petitioner was not a distributor of natural gas and was not engaged in the business of distributing natural gas as such terms are used in the statute; (2) that the Petitioner was engaged in interstate commerce while the tax was levied on the privilege of engaging in intrastate commerce carried on wholly within the State of Tennessee and not a part of interstate commerce and (3) that payment of the tax by Petitioner in addition to payment of the tax by its wholly owned subsidiary, Nashville Gas Company, results in double taxation upon the distribution of gas in the City of Nashville, which was not intended by the statute. The Attorney General of the State of Tennessee ruled to the contrary. Petitioner's views were set out in a letter to the Attorney General dated January 3, 1948 (App. 41A) and the Attorney General's views were set out in his reply dated January 23, 1948 (App. 47A).

This exchange of letters did not end the controversy. The record shows that representatives of Petitioner had repeated conferences with the Office of the Attorney General of the State, and with the state taxing officials, continuing its insistence that it was not liable for the payment of the tax, all of which was in vain, and consequently Petitioner did pay the tax under compulsion on or about August 1, 1948, and has continued such payments in each succeeding year. (App. 52A).

The section of the General Revenue Act of Tennessee imposing the Gross Receipts Tax is now codified in Section 1248.3, Item h of the Supplement to the Code of Tennessee beginning on Page 539 of Volume I of the Code Supplement.

Section 1248.5 requires that every person exercising any privilege declared to be taxable by an item providing for administration under this Section shall file a verified return on or before the first day of August of each year with the Commissioner of Finance and Taxation. The Section further provides that any person who fails to file the verified return and pay the tax on or before August 1 of any year shall be assessed as a penalty an additional amount of ten (10%) percent of the amount of the tax, together with interest on the tax and penalty at the rate of six (6%) percent per annum. The section authorizes the Commissioner of Finance and Taxation to require inspections of the books and records of the taxpayer to determine the accuracy of the return.

Section 1248.8 of the Supplement to the Code of Tennessee, subsection (c), provides that it shall be the duty of each agent or employee of the Commissioner of Finance and Taxation to visit each place of business in his territory and to call for the production of the license for the doing of that business. It is provided that if the license can not be shown to such agent or employee, that the agent shall report such fact to the Commissioner of Finance and Taxation, who shall forthwith issue, or have issued, a distress warrant for the collection of such tax, including interest and penalty. It is provided that such distress warrant may be addressed and delivered to the sheriff of the county wherein the delinquent taxpayer resides or has his principal office or place of business, and further provides that such sheriff may execute such warrant by distraint and sale of personal property belonging to the delinquent taxpayer, and that such proceedings shall be the same as are required by law for proceedings under execution at law from a court of record. It is further provided that if the officer cannot find personal property, he may levy upon real estate, making his return to the Circuit Court of the county wherein the land lies.

The exclusive remedy of a taxpayer in Tennessee for refund of taxes illegally exacted from him is contained in Section 1790 through 1799 of Williams Annotated Code of Tennessee. Section 1790 provides that in all cases in which an officer charged by law with the collection of revenue due the state, shall institute any proceedings, or take any steps, for the collection of the sum alleged or claimed to be due from any taxpayer, the taxpayer against whom the proceedings or steps are taken, shall, if he conceives the same to be unjust or illegal, pay the same under protest.

Section 1792 provides that after having made said payment, the taxpayer may at any time within thirty (30) days and not longer thereafter, sue the said officer having collected said sum for the recovery thereof.

It was this situation which the Petitioner faced when it was first forced to pay this tax on or about August 1, 1948, and it is this situation which it still faces.

The propriety of the petitioner including in its cost of service payments which it had made to the State of Tennessee in the form of the Gross Receipts Tax was never questioned by the Commission until the proceedings in the Commission Docket G-2255, which is here subject to review. When the insistence was made that Petitioner should not pay the tax and should not include it in its cost of service, Counsel for Petitioner, after first being authorized by the management of the Company, stated on the record that the Company will pay under protest the tax which is due and payable on August 1, 1954, that it will file suit to recover the tax so paid, and if successful in that litigation, the Company offered to pay over to its subsidiary, the Nashville Gas Company, all portions of the tax so recovered which relate to sales made by Petitioner to the Nashville Gas Company, (App. 60A) and petitioner further agreed to bear the entire expense of such litigation without directly or indirectly burdening its customers with any such expense. (App. 61A).

In spite of all this, the Commission in its order of April 16, 1954, refused to permit the Petitioner to include in its cost of service the amount which it paid during the test year in the form of the Gross Receipts Tax. (App. 76A).

STATUTES INVOLVED

Section 1248.126 of Williams Code of Tennessee (now codified in Section 1248.3, Item h, of the Supplement to the Code of Tennessee) provides in pertinent part:

> "1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the state for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half per cent (1½%) of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.
>
> This tax shall not apply to cities or other political subdivisions of the state owning and operating gas

> companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.
>
> It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.
>
> There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise Tax Law during the calendar year in which the tax hereby levied becomes due."

Section 4 (a) of the Natural Gas Act of June 21, 1938 (Title 15 U.S.C., Section 717 c (a)) which provides:

> "All rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."

Section 19 (b) of the Natural Gas Act of June 21, 1938, (Title 15 U.S.C., Section 717 r) which reads in pertinent part:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty (60) days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was

> entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Section 1254 of Title 28."

Section 10 (a) of the Administrative Procedure Act of June 11, 1946, Title 5 U.S.C., Section 1009 which provides:

> "(a) Any person suffering legal wrong because of any adverse action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

STATEMENT OF POINTS

1. The Commission erred in excluding from Petitioner's cost of service the amount of money which Petitioner is required to pay to the State of Tennessee in the form of the Tennessee Gross Receipts Tax. This is error because the Natural Gas Act provides that all rates shall be "just and reasonable." Petitioner's rate of return on sales to its only resale customer will be only 3.2% if Petitioner pays the Tennessee Gross Receipts Tax but is not allowed to include the payment of such tax in its cost of service on sales to its resale customer. A 3.2% rate of return is not a "fair rate of return," which by the

terms of the Natural Gas Act Petitioner is entitled to receive.

2. The Commission erred in holding in its order of April 16, 1954 (App. 76A-79A) as follows:

> ". . . Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued Tennessee Natural that:
> (9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.
> (10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1), above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned. *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129) (1945)

This is error because the restrictions imposed upon the certificate granted Tennessee Natural in Docket G-575 (4 F.P.C. 1127, 1129), quoted above, violates the provisions of the Natural Gas Act. The exclusion of any legitimate item of expense from Petitioner's cost of service deprives Petitioner of the right to rates which are "just and reasonable" and which do not yield to it a fair rate of return on its investment.

3. The Commission erred in fixing rates for Petitioner which yield it a return on its investment of only 3.2%. Particularly is this true when the record shows that Petitioner's outstanding mortgage bonds bear interest at 3.25% and its debentures carry interest at 4.50%. With such an interest cost, a 3.2% return on the entire investment means a return of less than 3% on the book value of the Company's common stock equity, which return is clearly confiscatory.

SUMMARY OF ARGUMENT

Since the year 1948, Petitioner has paid to the State of Tennessee the Gross Receipts Tax under compulsion and to avoid a levy upon its property. It took the position in good faith that it was not liable for the tax and the Attorney General of Tennessee, the highest legal officer of the State, ruled to the contrary. Petitioner continued its insistence after receiving a ruling from the Attorney General for a period of nearly eight months and until the tax was due, but both the Attorney General and the taxing officials of the State were unyielding in their demands. Certainly petitioner has paid the tax each year since the year 1948 in perfect good faith. It is respectfully submitted that it would be unjust, inequitable and illegal to refuse to Petitioner the right to include this substantial item of expense in its cost of service and to refuse to permit petitioner to charge rates to its resale customer based upon such cost of service.

The Commission based its action in refusing to permit Petitioner to include the payment of its Gross Receipts Tax in its cost of service in part, at least, upon certain restrictive provisions which were contained in the first certificate of convenience and necessity issued to Petitioner in F.P.C. Docket G-575 (4 F.P.C. 1127, 1129), which certificate was issued in the year 1945. The facilities authorized to be constructed and operated by this certificate was a fourteen mile 8⅝″ pipeline extending from the pipeline of Tennessee Gas Transmission Company, which is petitioner's sole supplier of natural gas, to a metering station at Bordeaux, where Petitioner sells gas to the Nashville Gas Company.

Five years subsequent to the issuance of that certificate, the Commission issued to Petitioner another certificate in its Docket G-1381, 9 F.P.C. 912. By the terms of this certificate, Petitioner was authorized to construct and operate facilities far more extensive than those originally authorized and no restriction was contained in that certificate such as the one relied upon by the Commission in the certificate issued in Docket G-575.

Such a restriction as that contained in the certificate issued in Docket G-575 is violative of the provisions of the Natural Gas Act because it prevents Petitioner from charging rates which are "just and reasonable" and because it deprives the Petitioner of the right to a "fair rate of return" on its investment.

The exclusion of the payment of the Tennessee Gross Receipts Tax from Petitioner's cost of service results in allowing Petitioner a rate of return of only 3.2%. A 3.2% rate of return is not a "fair rate of return." The Natural Gas Act specifically provides that a natural gas company is entitled to rates which are "just and reasonable." Uniformly, "just and reasonable" rates have been declared by the Commission and the courts to be rates that yield a fair rate of return on the investment. A 3.2% rate of return is less than the cost of Petitioner's debt money. Its outstanding mortgage bonds yield an interest rate of 3.25% and its debentures yield an interest rate of 4.50%. Therefore, a 3.2% rate of return is plainly confiscatory. It constitutes a violation of the Natural Gas Act, a denial of due process of law, a confiscation of the property rights of Petitioner, and denies an equal protection of the laws, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT

Description of Petitioner's Facilities

Petitioner has been rendering natural gas service to its wholly owned subsidiary, the Nashville Gas Company, since sometime in the year 1947. Its present facilities were built pursuant to authorization of the Commission, Respondent in this proceeding, contained in two certificates of public convenience and necessity, one issued on December 29, 1945, F.P.C. Docket G-575 (4 F.P.C. 1127), and the other issued on July 11, 1950, in F.P.C. Docket G-1381 (9 F.P.C. 912). Its present facilities are shown on a map filed as Exhibit 7 in the F.P.C. proceeding G-2255 here under review. (App. 63A.1). The facilities first authorized consisted of a fourteen mile line 8⅝″ in diameter, extending from the pipeline of Tennessee Gas Transmission Company, Petitioner's sole supplier of natural gas, to the Bordeaux Station, where gas was sold to the Nashville Gas Company.

In F. P. C. Docket G-1381 (9 F.P.C. 912), the Petitioner was authorized to construct and operate, and pursuant to that authority has constructed and does operate far more extensive facilities than those authorized in the original certificate. These facilities consist of approximately nine miles of 10¾″ pipeline which runs parallel to Petitioner's original 8⅝″ pipeline, approximately nine miles of 8⅝″ pipeline extending from the terminus of the 10¾″ line in an easterly direction for approximately four miles, and thence in a southerly direction for approximately five miles to a new point of interconnection with the facilities of the Nashville Gas Company at a new City Gate Station known as the Trinity Lane Station, approximately six miles of 6⅝″ pipeline extending from a point at the eastern end of the said four mile section of the line immediately above described in an easterly direction to a point near Old Hickory, Tennessee, and regulator and meter stations to render service in the towns of Madison, Amqui, Rayon City, Old Hickory, and DuPontonia, as well as the additional City Gate Station on Trinity Lane above referred to, and, in addition to deliver gas to the DuPont Company near Old Hickory. A total of twenty-four (24) miles of additional line was authorized in the G-1381 proceeding as contrasted with the fourteen (14) miles in the G-575 proceeding and five additional regulator and meter stations were likewise authorized, as contrasted with one in the former.

As shown on the map, Exhibit 7 (App. 63A1) the City of Nashville is located on both sides of the Cumberland River. When the original certificate authorized in G-575 was issued and the facilities authorized therein were constructed, the Nashville Gas Company had to extend a line across the Cumberland River near the Bordeaux Station and then again cross the Cumberland River to serve its customers in what is known as East Nashville. The building of the facilities authorized in G-1381 mentioned above, providing for delivery of gas to the Nashville Gas Company at the Trinity Lane Station, shown on said map, made it possible to render far more adequate, more dependable and safer service to the citizens of the City of Nashville. In addition, it made possible service to the additional communities above referred to, all located along the 8⅝″ line running to the Old Hickory Station.

Petitioner Has Been Forced to Pay the Tennessee Gross Receipts Tax Since the Year 1948

On January 3, 1948, Petitioner's Counsel wrote a letter to the Attorney General of the State, taking the position that it was not liable for the Tennessee Gross Receipts Tax (App. 41A). On the 23 day of January, 1948, the Attorney General's Office replied to the arguments advanced by Counsel for the Petitioner in a letter addressed to Petitioner's Counsel. (App. 47A). He very firmly and flatly took the position that Petitioner was liable for the tax. In the approximately seven months ensuing between this exchange of letters and the date upon which the taxes became due, namely, August 1, 1948, representatives of Petitioner had various conferences with the Office of the Attorney General and with the State taxing officials, at all times insisting that it was not liable for the tax, but the State officials were unyielding in their demands. (App. 52A). Petitioner was then faced under Tennessee statutes with the issuance of a distraint warrant and a levy upon its property unless it paid the tax. (Sections 1248.5 to Sections 1248.11, inclusive, of the Supplement to the Code of Tennessee). The only alternative which this young company had was to pay the taxes under protest and sue to recover. This is the exclusive remedy in Tennessee of a taxpayer for refund of taxes illegally exacted. (Sections 1790 to 1799, inclusive, of Williams Annotated Code of Tennessee).

In good faith, the Petitioner decided not to run the risks involved and paid the taxes under compulsion.

The Bench and Bar in Tennessee has great respect for the office of Attorney General in this State and for the men who have held this office throughout the State's history. By this we do not mean to say that these officials are infallible, but their opinions are highly regarded. The office of Attorney General of Tennessee is in one sense of the word not a political office, since this official is not elected by the people, as is the Attorney General in most of the states. On the contrary, he is appointed by the Justices of the Supreme Court of Tennessee (Section 642, Williams Code of Tennessee).

By statute, the Attorney General is required:

> "To give to the officers of the State, when called on, written legal opinions on all matters submitted by them in the discharge of their official duties." (Section 9956 (6), Williams Code of Tennessee.)

It is generally recognized that opinions of the Attorney General are entitled to great respect and should not be departed from lightly. It is said in *Badger vs. Hoidale*, 88 Fed. 2d, 208:

> "As a further indication of what was intended by this amendment, it is observed that the Attorney General of Minnesota, in an opinion to the Commissioner of Securities, concluded that the amendment superceded and therefore repealed the prior Section 3 of Article 10. This opinion, is, of course, not binding on this Court, but it is entitled to great respect and should not be departed from lightly." Citing *Standard Computing Scale Company v. Farrell*, 242 Fed. 87.

Nevertheless, the Respondent in this proceeding brushed aside completely the opinion of the Attorney General of Tennessee, and apparently felt that its own construction of the Tennessee taxing statute carried far greater weight than did the opinion of the Attorney General, who is directly charged with this responsibility.

The Commission Staff in its brief filed with the Commission on the question of Petitioner's liability for this tax took in substance the same position which Petitioner's Counsel took in his letter to the Attorney General of January 3, 1948. (App. 41A). Nevertheless, candor demands of us that we say we do not feel as does Staff's Counsel that the matter of petitioner's liability for th tax is free from doubt. The statute imposes the tax "for the privilege of engaging in intrastate commerce carried on wholly within this State and not a part of interstate commerce." All of Petitioner's properties are located wholly within the State of Tennessee. It buys its gas from an interstate pipeline in Tennessee and all of the gas which it sells is sold and consumed within the State of Tennessee. The Staff has relied heavily (as did Petitioner's Counsel in his January 3, 1948, letter to the Attorney General) on an opinion of the Supreme Court of Tennessee in *Memphis Natural Gas Compay vs. McCanless,* 180 Tenn., 688, 177 S.W. (2) 841. In that case, the Tennessee Supreme Court held that the Memphis National Gas Company was not liable for the Gross Receipts Tax. From a physical standpoint, Petitioner does not own and operate an interstate pipeline. On the contrary, Memphis Natural Gas Company's pipeline originated in Louisiana, crossed Mississippi and entered the State of Tennessee.

It is quite true that under the authority of *Federal Power Commission v. East Ohio Gas Company,* 338 U.S. 464, 94 Law Ed., 268, and other cases, Petitioner, at least for regulatory purposes, is engaged in interstate commerce by reason of the fact that it buys its gas from Tennessee Gas Transmission (T.G.T.), which is an interstate pipeline.

We do not believe we could successfully advance the argument that the State of Tennessee is without power to impose the tax upon Petitioner because of the Interstate Commerce provisions of the Federal Constitution. The United States Supreme Court cases on the subject of the right of States to tax the natural gas business indicate that the dividing line between Federal power and State power is the point at which the stream of gas is broken up for local distribution for consumption. *State Tax Commission v. Interstate Natural Gas Company,* 284 U.S. 41; 76 Law Ed., 156. *Southern Natural Gas Corp. v. Alabama,* 301 U.S., 148, 81 Law Ed., 970. In the latter case, Southern Natural was held to be subject to the taxing power of Alabama because it established service lines to plants of the Tennessee Coal, Iron and Railroad Company, just as Petitioner has established service lines to the City of Nashville, to five other communities outside of Nashville, and to the DuPont Company at Old Hickory. In the Southern Natural Gas Corporation case, supra, this was said to be similar to the breaking of the original package in that time-honored theory of the termination of interstate commerce. The court noted that the headquarters of the Company was in Alabama and that the law did not attempt to tax property beyond the State. Chief Justice Hughes said:

> "The rule was thus stated in International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. Ed. 781, 49 S. Ct. 380, supra: 'A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the State, is not invalid because a part of the property or capital included in computing the tax is used by it in interstate commerce.' There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote, not differing in this respect from the effect of ordinary ad valorem taxation of property within the State. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct., 268, 5 Inters. Com. Rep. 1, and St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265, 35 S. Ct. 99, supra." (p. 976).

The fact that the transportation of an interstate commodity wholly within one State is interstate commerce for the purposes of regulation does not mean that it cannot be taxed by the State wherein it is transported. *Central Greyhound Lines v. Mealey,* 334 U. S. 653; 92 L. Ed., 1633.

It seems to us that in resisting payment of the tax our strongest reliance must of necessity be on the Tennessee case of *Memphis Natural Gas Company v. McCanless,* supra. We must take the position that the Tennessee Legislature did not intend to tax a business such as that of Petitioner when it enacted the Tennessee Gross Receipts Tax (Sec. 1248.126 of the Code of Tennessee). We must recognize the fact, however, as heretofore pointed out, that Memphis Natural Gas Company was physically and geographically an interstate pipeline while Petitioner is located wholly within the State of Tennessee. We must also face the fact, as shown in that opinion, that Memphis Natural Gas Company did not run service lines to serve its Tennessee customers, but on the contrary, arranged for delivery of the gas to the City of Memphis through municipal pipelines.

We do not think it can be challenged that Petitioner has been paying this tax in absolute good faith; that it vigorously resisted the payment of the tax; that the highest legal authority in the State, as well as the State taxing officials, held it was liable for the tax, and that it faced a levy on its property if it did not pay the tax.

The propriety of Petitioner including in its cost of service its liability for the Tennessee Gross Receipts Tax was never questioned by the Respondent until the proceedings in Docket G-2255. At the hearing in that proceeding, Petitioner offered, so as to test the matter of its liability, to pay the tax under protest when it becomes delinquent immediately after August 1, 1954, and to then sue to recover the tax so paid. It further offered, if successful in this litigation, to refund to its only resale customer, the Nashville Gas Company, that portion of the tax recovered which is generated by sales made by the Petitioner to the Nashville Gas Company, and it further offered to conduct this litigation at its own expense without directly or indirectly burdening its customers with this expense. (App. 60A-61A).

In spite of all this, the Commission refused to permit the Petitioner to include this item of expense in its cost of service, and allowed only the rates set out in the left hand column of Exhibit 10 (App. 66A), this being the stipulated rate with the Gross Receipts Tax excluded. We most respectfully submit that such action by the Respondent herein is arbitrary and illegal.

Under the Natural Gas Act, Petitioner Has the Absolute Right to Include in Its Cost of Service the Tennessee Gross Receipts Tax Which It Pays

In its Order of April 16, 1954, (App. 76A) the Respondent assigned as its second reason for not permitting the Petitioner to include in its cost of service the Tennessee Gross Receipts Tax, the following:

> ". . . Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate entity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first certificate of public convenience and necessity issued Tennessee Natural that:
>
> > '(9) By reason of the proposed ownership and operation of the stub-line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately fourteen miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.
> >
> > '(10) The construction and operation by applicant of the facilities referred to in paragraph (a) (1), above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of

> the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned. *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company,* Docket No. G-575 (4 F.P.C. 1127, 1129) (1945)'
>
> "To permit the tax to be included in Tennessee Natural's cost of service would impose on gas consumers in the City of Nashville an added tax and double cost resulting solely from the ownership and operation of the pipeline by a separate corporate entity. As at the time of the Docket G-575 proceedings, we find that this is contrary to the public interest. Accordingly, the Gross Receipts Tax must be eliminated in determining Tennessee Natural's cost of service."

It will be noted from the above that the only item of Petitioner's cost which the Respondent then found would not be a reasonable element in the cost of gas to the consumers of Nashville was *"the estimated cost of transportation of the gas over a distance of approximately fourteen miles."* The Respondent seems to have overlooked completely the fact that five years later Petitioner in Docket G-1381, 9 F.P.C. 912, obtained still another certificate from the Commission to render far more adequate service to the City of Nashville, and, in addition, to render natural gas service to the additional communities outside of Nashville of Madison, Amqui, Rayon City, Old Hickory, and DuPontonia. Nowhere in this certificate is there found any such restriction as the Respondent points out in Findings (9) and (10) in the G-575 proceeding quoted above. We have described at some length these additional facilities under the heading in this brief, "Description of Petitioner's Facilites." It seems clear to us that when the second certificate was issued, that the Respondent concluded that the restrictions imposed in Findings (9) and (10) in the G-575 certificate quoted above were no longer justified.

With respect to the Respondent's statement quoted above, referring to *"the dual corporate entity of a single enterprise transporting gas to and distributing gas in the City of Nashville,"* the intervenors in this proceeding, Tennessee Commission and Nashville, likewise stressed this "dual corporate entity" and yet the order issued in Docket G-575, 4 F.P.C. 1127 shows that both of these intervenors intervened in that proceeding, and the record in that proceeding further shows that they intervened in support of Petitioner's application for a certificate to render this service to the City of Nashville.

The only cost which Respondent found to be excessive in the G-575 certificate was "the estimated cost of transportation of gas over a distance of approximately fourteen miles." What these transportation costs are are not disclosed in this record. It is apparent that the so-called fourteen mile "stub line" had to be built by someone to make gas available to the Nashville Gas Company from the line of Tennessee Gas Transmission Company fourteen miles away. If Petitioner had not been permitted to build the line, and, if Nashville Gas Company was to receive gas service, then either Nashville Gas Company or Tennessee Gas Transmission Company or someone else would have had to built it. Whoever had built the line, it is perfectly apparent that the costs incident thereto would have been allowed in that company's rate base, and the consumers of gas in Nashville would have been charged rates computed upon the entire rate base of that company, including the cost of the so-called "stub line." It seems to us of no consequence who built the fourteen mile "stub line" insofar as rates ultimately charged to consumers in Nashville is concerned.

Furthermore, Petitioner insists that the restrictions referred to in findings (9) and (10) in the G-575 Certificate are now and always have been invalid because in contravention of the specific provisions of the Natural Gas Act.

An exactly parallel situation has just been ruled upon by the Court of Appeals for the 10th Circuit in *Colorado Interstate Gas Company v. Federal Power Commission,* 209 Fed. 2d. 717. (The Supreme Court has granted certiorari in that case.) In that case Colorado Interstate sought a review of the order of the Commission reducing Colorado's rate for natural gas sold in interstate commerce for resale.

Most questions were decided adversely to Colorado Interstate, but the following point was in its favor. The Commission had refused to permit Colorado to include in its cost of service certain costs which, by a former order of the Commission permitting the merger of Colorado with Canadian River Gas Company, were specifically ordered to be excluded in any proceeding in which the rates of Colorado were to be under inquiry. The Court said:

> "Under the merger (above referred to) it was proposed to transfer from Canadian River to Southwestern Development Company * * * the liquid hydro-carbons in the gas production by Canadian River from the West Panhandle Field. Colorado was to continue to process the wet gas to remove the liquid hydro-carbons. Under this arrangement the revenues derived by Canadian River from the extraction and sale of natural gasoline, which had theretofore been used to reduce the cost of gas purchased by Colorado from Canadian River, would be lost upon the consummation of the merger. The authorization for the merger *was granted upon the express condition* (emphasis added) that whereas rights to liquid hydro-carbons in place were granted to the Southwestern Development Company and whereas Colorado was to receive 50% of the gross proceeds from the sale of certain liquid hydro-carbons and 15% of the

> net revenue was to be received by Colorado from the hydro-carbons resulting from the operation of Fritch Natural Gas Plant of Texoma Natural Gas Company, that if the cost properly allocable to such hydro-carbons exceeded the amounts payable to Colorado pursuant to such transactions, then and in that case *in any proceeding in which the effective or proposed rates of Colorado are under inquiry, such excess should not be considered as a cost of service to Colorado's natural gas customers and consumers.* The Commission determined that there was a loss from such operations, and deducted the amount it found as the loss from the cost of service." P. 725.

Earlier in the opinion the Court said:

> "The primary purpose of the Natural Gas Act was to protect the users of gas against exorbitant exactions at the hands of the natural gas companies, and, on the other hand, assure to them the right of a fair return from their operations." P. 724.

In other words, under the Act the Commission has the duty not only to see to it that exorbitant rates are not charged, but it also has the duty to assure to a natural gas company the right of a fair return from its operations.

In passing upon the question as to whether or not the Commission correctly eliminated the loss from these gasoline operations from the cost of service, the Court said:

> "The gasoline operations were as much a part of Colorado's business as any other operation. Save for the provision in the merger order hereinbefore italicized, the total costs of the operation of this department would have of necessity been considered as a part of the total cost of service. The Commission seeks to justify its elimination of the loss from the cost of service under the provision in the merger order that such loss should not be taken into account in establishing new rates." P. 726.

The Court then called attention to the fact that the basic principle running through all the decisions is that the deciding factor in a rate hearing is the end result. Thereupon, the Court quotes from *Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U. S. 581, 89 Law Ed., 1206, as follows:

> "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end." P. 726 and 727.

Following the quotation, the Court in 209 Fed. 2d., 717 comments:

> "Conversely, if the total overall effect of the rate order is to deprive the utility of the opportunity to earn a fair return, it cannot stand." P. 727.

The basic principles involved in the Commission's elimination from Colorado's cost of service of the items above referred to are then disposed of by the Court in the following language:

> "It would seem that the elimination of the loss of the gasoline operations from the cost of service deprives Colorado of earning the fair rate of return to which it is entitled. It means that this loss must come out of the net profits of the stockholders notwithstanding that it is an element of cost of service. Nor is it an answer to say that this was a condition of the merger order and that, therefore, Colorado's stockholders are bound and saddled with this loss. We are dealing here with a business affected with a public interest. Parties in such businesses are not free to contract as they choose. They are subject to regulation by proper Governmental authority. In the exercise of its jurisdiction, such authority must be fair, both to the public and to the utility. It is the statutory duty of the Commission to establish on the one hand rates that are fair and just to the utility

> and on the other hand to strike down rates that demand an unlawful and unreasonable exaction. *A rate based upon the exclusion from the cost of service, no matter for what reason, of a substantial amount of admitted operative cost does not and cannot reach a just end result and may, therefore, not stand.*
> "The provision in the merger order that such operative costs as we are considering here should be eliminated from the cost of service base in subsequent rate hearings does not alter these basic principles. When that proceeding was before the Commission, *it was its statutory duty to determine whether the plan was fair and just to Colorado's gas users.* If it found that it might result in an unjust burden on them, it had power to disapprove it. It could not predicate its approval thereof upon a condition which it could not adopt in a rate hearing and which would thereafter deprive Colorado of the opportunity to earn a fair return upon its investment." (Emphasis added). P. 727.

The Commission, being dissatisfied with this portion of the Court's opinion, filed a petition to rehear, which was denied. We quote the following from the opinion on the rehearing:

> "But aside from that we think that in reviewing the Commission's order we have inherent power to consider and correct manifest and substantial error appearing in the record which leads to an unjust end result *and deprives Colorado of the opportunity of earning that which the law says is its right, namely, a fair return on its investment.*" (Emphasis added.) P. 732.

A 3.2% Rate of Return is Not a "Fair Rate of Return" and Does Not Provide for "Just and Reasonable Rates" as Provided by the Natural Gas Act

Appendix "A" to this brief is a table which shows the effect on the rate of return of Petitioner if it is not permitted to include in its cost of service its liability for the

Tennessee Gross Receipts Tax. An examination of this table clearly shows that if such liability is not included in the cost of service, that Petitioner's rate of return is only 3.2%. It will be noted from Exhibit 1 (App. 63A) that Petitioner's outstanding mortgage bonds bear interest at 3.25% and its debentures carry interest at 4.50%. With such an interest cost, a 3.2% rate of return on the entire investment means a return of less than 3% on the book value of the Company's common stock equity, which return is clearly confiscatory.

We submit that never before has the Respondent in any rate proceeding, nor have the Courts in reviewing rate proceedings, approved a rate of return as low as 3.2%. In fact the lowest rate of return allowed any natural gas company of which we have knowledge is 5½%. We therefore respectfully submit that the Respondent's Order of April 16, 1954, (App. 76A) constitutes a violation of the Natural Gas Act, a denial of due process of law, a confiscation of the property rights of Petitioner, and denies the equal protection of the laws, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

We earnestly insist that Respondent's Order should be modified so as to permit it to continue in effect the rates set out in the Commission's Order adopted June 16, 1954, and issued June 17, 1954, (App. 98A-100A) which rates are effective pending the outcome of this litigation and which Order was issued by the Respondent pursuant to the statement of the Court on June 11, 1954, after the argument on Petitioner's application for a stay of Respondent's April 16 Order. Such rates are as follows:

Demand Charge	
First 36,800 Mcf per Month of Billing Demand, $ per Mcf	$2.20
All excess Mcf per Month of Billing Demand, $ per Mcf	1.82
Commodity Charge	
Cents per Mcf	15.6

Respectfully submitted,

Phil B. Whitaker
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee
Attorney for Petitioner

Of Counsel
Whitaker, Hall & Haynes
1415 Hamilton National Bank Bldg.
Chattanooga 2, Tennessee

APPENDIX A

This table shows the effect on the rate of return of the applicant unless it is permitted to include in its cost of service its liability for the Tennessee Gross Reecipts Tax.

TENNESSEE NATURAL GAS LINES, INC.

Table 1

Cost of Service, Excluding Cost of Gas Purchased and Tennessee Gross Receipts Tax, Allocated to Sales to Nashville Gas Company in Exhibit 9

	Total Cost of Service to All Customers, Excluding Cost of Gas Purchased and Tennessee Gross Receipts Tax			Cost of Service, Excluding Cost of Gas Purchased and Tennessee Gross Receipts Tax Allocated to Nashville Gas Company		
Cost Item	Total (1)	Demand (2)	Commodity (3)	Demand (4)	Commodity (5)	Total (6)
Transmission Expense	$16,166	$ 8,083	$ 8,083	$ 8,083	$ 5,417	$ 13,500
Sales Promotion Expense	495	—	495	—	332	332
Adm. and Gen. Expense	19,929	9,668	10,261	9,668	6,877	16,545
Depreciation	30,543	15,272	15,272	15,272	10,235	25,507
Taxes—Federal Income	32,278	16,139	16,139	16,139	10,816	26,955
Taxes—Other	22,777	11,389	11,388	11,389	7,632	19,021
Return @ 6%	68,457	34,229	34,228	34,229	22,940	57,169
	$190,645	$94,780	$95,865	$94,780	$64,249	$159,029

Note: Amounts in Column 4 are 100% of amounts in Column 2
Amounts in Column 5 are 67.02% of amounts in Column 3

Table 2

Comparison of Revenue, Allocated Costs, and Return on Sale to Nashville Gas Company If Tennessee Natural Gas Lines, Inc. Must Pay the Tennessee Gross Receipts Tax But Is Allowed Rates Which Exclude Such Tax

Item	Source	Amount
Revenue from Nashville Gas Company under which Excludes Tennessee Gross Receipts Tax	Exhibit 10	$2,265,053
Costs Allocated to Nashville Gas Company Sale		
(1) Operating Expenses, Depreciation, Taxes and Return	Table 1	159,029
(2) Cost of Gas Purchased	Exhibit 10	2,102,199
(3) Tennessee Gross Receipts Tax	Exhibit 10	30,456
Total Cost Allocated		$2,234,515
Net Revenues from Nashville Gas Company Sale (Return)		$30,538

Note: The above return of $30,538 is 53.4% of the $57,169 of return allocated to the Nashville Gas Company sale on a 6% return basis as shown in Table 1. Hence the return on such sale will be only 53.4% of 6% or 3.2% if Tennessee Natural Gas Lines, Inc. must pay the Tennessee Gross Receipts Tax but is not allowed to include such tax in its rate to Nashville Gas Company.

BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12249

TENNESSEE NATURAL GAS LINES, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE AND CITY OF NASHVILLE, TENNESSEE, INTERVENORS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

WILLARD W. GATCHELL,
General Counsel,
LAMBERT McALLISTER,
Assistant General Counsel,
PASCAL B. FRAZIER,
LOUIS FLAX,
Attorneys,
Counsel for Respondent, Federal Power Commission.

WASHINGTON 25, D. C.,
September 1954.

United States Court of Appeals
For the
District of Columbia Circuit

FILED SEP 28 1954

Joseph W. Stewart
CLERK

COUNTERSTATEMENT OF QUESTION PRESENTED

In a proceeding before the Federal Power Commission involving the rates and charges for the sale in interstate commerce of natural gas for resale by Petitioner, a "natural-gas company" subject to the jurisdiction of the Commission, did the Commission properly exclude from the cost of service upon which just and reasonable rates are to be determined, the Tennessee Gross Receipts Tax which by its plain provisions was only applicable to persons engaged in the business of distributing gas in intrastate commerce, where (1) Petitioner is not engaged in any way in the distribution of natural gas in intrastate commerce, and (2) the only sale made by Petitioner in interstate commerce for resale is to its wholly owned subsidiary which distributes gas to the public and which also pays the Tennessee Gross Receipts Tax on the gas which it purchases from Petitioner?

TABLE OF CONTENTS

Page
Counterstatement of question presented I
Table of contents III
Table of citations III
Counterstatement of the case 1
  Introduction 1
  Petitioner's operations 1
  Proceedings before the Commission 4
  Proceedings before the Court 4
Statute involved 5
Summary of argument 6
Argument 8
  I. The Commission's disallowance of taxes paid by petitioner under the Tennessee Gross Receipts Tax was proper since the Tennessee statute by its express terms and as construed by the Tennessee court of highest jurisdiction is inapplicable to Petitioner's sales of natural gas to Nashville Gas for resale 8
    A. The Tennessee Tax Statute on its face and as construed by the Tennessee Supreme Court is inapplicable to Petitioner 9
    B. In fixing just and reasonable rates, the Commission must disallow unreasonable and improper costs ...
  II. Payment by Petitioner of the Tennessee Gross Receipts tax constitutes an unwarranted double exaction from the rate payers contrary to the public interest 18
Conclusion 22

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Arkansas-Louisiana Gas Co. v. *City of Texarkana*, 17 F. Supp. 447, affirmed, 96 F. 2d 179 (Dist. Ct. W. D. Ark., Texarkana Div., 1936), cert. denied, 305 U. S. 606 17
Beal v. *Missouri Pacific R. Co.*, 312 U. S. 45 (1941) 13
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Cases—Continued

Page

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Phillips Petroleum Company v. *Wisconsin*, 347 U. S. 672 (1954) 12

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Westchester Lighting Company, 15 P. U. R. (N. S.) 299 (N. Y., 1936) 17

Page

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- Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717:
  - Section 1 (b) 3
  - Section 2 (6) 2
  - Section 4 (a) 16
  - Section 19 (b) 1
- Williams Code of Tennessee, Section 1248.126 (Tennessee Gross Receipts Tax) 5, 9

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12249

TENNESSEE NATURAL GAS LINES, INC., PETITIONER
v.
FEDERAL POWER COMMISSION, RESPONDENT

TENNESSEE RAILROAD AND PUBLIC UTILITIES COMMISSION,
CITY OF NASHVILLE, INTERVENORS

PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Tennessee Natural Gas Lines, Inc. (Petitioner) seeks review under Section 19 (b) of the National Gas Act (Act)[1] of an order of the Federal Power Commission (Commission) issued April 16, 1954 (Jt. App. 75A–84A). By said order the Commission approved a settlement agreed upon by all parties in a pending rate increase proceeding before the Commission, but as to one issue, which was reserved for Commission determination, it found that the payment by Petitioner of the Tennessee Gross Receipts Tax was not a proper item of cost of service.

Petitioner's Operations.—Petitioner is a "natural-gas company" under the Natural Gas Act, as the Commission has twice determined.[2] It is engaged in the transportation of natural gas at high pressures in interstate commerce, and in the sale of such gas in interstate commerce for resale. The gas sold by Petitioner is transported by Tennessee Gas Transmission Company (Tennessee Gas Transmission) from the States of Texas and Louisiana at high pressures and flows from Tennessee Gas Transmission's lines into and through Petitioner's lines at the pressure supplied by Tennessee Gas Transmission, which varies from 475–625 pounds per square inch (Jt. App. 52A, 58A). Petitioner transports, sells, and delivers this gas to its wholly-owned subsidiary, Nashville Gas Company (Nashville Gas) for distribution in the City of Nashville and environs. At the points of delivery to Nashville Gas, the pressure of the gas is reduced to distribution pressures (Jt. App. 60A).

---

[1] 52 Stat. 821, 831; 15 U. S. C. 717, 717r.

Petitioner operates under a certificate of public convenience and necessity issued by the Commission on December 29, 1945, in Docket No. G–575 (4 F. P. C. 1127). The facilities constructed under this certificate consisted of a 14-mile line of 8-inch diameter pipe extending from a point of connection in the State of Tennessee with the pipe lines of Tennessee Gas Transmission (Petitioner's sole supplier of gas), to Petitioner's city gate station (Bordeaux Station) on the outskirts of Nashville, Tennessee, where the pipe lines of Petitioner connect with the distribution facilities of Nashville Gas and where the gas is delivered and sold to Petitioner's wholly owned subsidiary, Nashville Gas, for distribution within the city of Nashville.

Thereafter, in 1950, Petitioner applied for and received from the Commission in Docket No. G–1381 (9 F. P. C. 912) a certificate of public convenience and necessity authorizing the construction and operation of additional facilities to increase its delivery and sales capacity (Jt. App. 34A). These facilities included an additional 10-inch parallel loop line from the connection with Tennessee Gas Transmission for a distance of approximately 8½ miles, thence an additional 8-inch line extending 11½ miles to three town border stations for the delivery and sale of gas to Nashville Gas for distribution in three towns in the environs of the city of Nashville. Additionally, a new town border station was constructed for delivery of additional volumes of gas to Nashville Gas for distribution in Nashville. Also, Petitioner constructed a meter station to effect delivery to a direct interruptible customer, DuPont Company, on the outskirts of Nashville. At all metering stations the pressure of the gas is reduced by Petitioner for delivery to Nashville Gas and DuPont[3] (Jt. App. 60A).

---

[2] A "natural-gas company" is defined by Section 2 (6) of the Natural Gas Act as a "person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Petitioner was determined by the Commission to be a "natural-gas company" in *In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas Transmission Company*, Docket No. G–575, 4 F. P. C. 1127 (1945); and in *In the Matter of Tennessee Natural Gas Lines, Inc.*, Docket No. G–1381, 9 F. P. C. 912 (1950).

All gas sold by Petitioner to Nashville Gas moves at high pressures in a continuous and uninterrupted stream from points of production in Texas and Louisiana through the facilities of Tennessee Gas Transmission and the facilities of Petitioner. Only at the point of delivery by Petitioner to Nashville Gas where the gas enters the local distribution system is the pressure reduced. The sale by Tennessee Gas Transmission to Petitioner is a sale in interstate commerce for resale within the meaning of Section 1 (b) of the Natural Gas Act. Likewise the wholesale sale of the same gas by Petitioner to Nashville Gas for resale for public consumption in Nashville and environs is a sale in interstate commerce for resale under the Natural Gas Act. The sales by Nashville Gas to its customers, on the other hand, are not sales in interstate commerce but are intrastate sales by a distributing company subject to regulation by the Tennessee Railroad and Public Utilities Commission, and are exempt from Commission jurisdiction under Section 1 (b) of the Act.[4]

---

[3] The Commission has jurisdiction to fix the resale rates for the sale and delivery of gas to Nashville Gas (Pet. Br. 3). The sale to DuPont is not a sale for resale and the Commission has no jurisdiction over the rates at which the gas is sold, so that the questions presented in this case in no way involve this sale to DuPont.

[4] Section 1 (b) of the Act provides in part pertinent that "The provisions of this Act * * * shall not apply * * * to the local distribution of natural gas or to the facilities used for such distribution * * *."

Proceedings before the Commission.—This proceeding arose through the filing by Petitioner with the Commission on August 31, 1953, of revised tariff sheets to provide for an increase in the rates and charges for the gas sold to Nashville Gas for resale. Based on sales for the year ending June 30, 1953, the increase amounted to $226,683 per annum, or 11.1 percent over the then existing rates (Jt. App. 76A). After conferences looking to settlement of the case, agreement was reached by the parties[5] on all issues except as to the treatment of a Tennessee Gross Receipts Tax (Pet. Br. 4). The increase agreed to by all parties, without the Tennessee Gross Receipts Tax, was $159,141 (Jt. App. 61A). The Tennessee Gross Receipts Tax applicable to sales for resale to Nashville Gas was agreed to be $30,456 (Jt. App. 66A). This is the amount in dispute in this proceeding (Jt. App. 61A). There is no dispute among the parties as to the correctness of the dollar amounts involved.

Upon motion, the Presiding Examiner certified the record to the Commission (1) for approval of the rate settlement, and (2) for decision on the issue respecting the Gross Receipts Tax item (Jt. App. 27A–33A, 62A). On April 16, 1954 (Jt. App. 76A–84A) the Commission issued its order, the subject of this review proceeding, (1) approving the settlement and (2) finding and determining that on the record the Tennessee Gross Receipts Tax was not a proper item to be included in the cost of service to be recovered from Nashville Gas through rates to be established by the Commission (Jt. App. 80A).

Petitioner's application for rehearing was denied by order of the Commission issued May 27, 1954 (Jt. App. 96A). Thereafter, on June 1, 1954, Petitioner filed its petition for review in this Court.

Proceedings before the Court.—In this Court, Petitioner requested a stay of the order of the Commission insofar as it required Petitioner to file new rate schedules embodying the rate increase of $159,141, which excluded the Tennessee Gross Receipts Tax. Following oral argument before the Court on the question of the stay, and pursuant to the agreement of all parties, the Commission stayed said order pending the outcome of the review proceeding, and permitted Petitioner to file rates which would include the Tennessee Gross Receipts Tax, subject to refund of such additional charges if the Commission's order under review is affirmed.

---

[5] Petitioner, Commission Staff, City of Nashville, and Railroad and Public Utilities Commission of Tennessee. The latter two are intervenors in this proceeding.

STATUTE INVOLVED

The Tennessee Gross Receipts Tax involved here (Section 1248.126 of Williams Code of Tennessee) reads as follows:

> 1248.126. Item G. Gas, water, electric power and light companies.—Each person engaged in the business of furnishing or distributing gas, water, or electric current, whether to dealer, consumer, municipality or other customer, shall, for the privilege of doing such business, pay to the state for state purposes an amount equal to three per cent (3%) of the gross receipts derived from intrastate business in the state. *Persons engaged in the business of manufacturing gas or of distributing manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half percent (1½%) of the gross receipts derived from intrastate business in this state, which payment shall be subject to the same provisions, restrictions and credits hereinafter provided in this item.*
>
> This tax shall not apply to cities or other political subdivisions of the state owning and operating gas companies, water companies or power plants; nor shall it apply to any governmental agency of the United States.
>
> *It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce carried on wholly within this state and not a part of interstate commerce.*
>
> There shall be credited upon the tax hereby imposed any taxes paid by the owner of such business on any of the businesses named in the heading of this item under the Franchise Tax Law and under the Excise

> Tax Law during the calendar year in which the tax hereby levied becomes due. [Emphasis supplied.]

SUMMARY OF ARGUMENT

The Commission was required by the proper execution of its functions under the Natural Gas Act to exclude from Petitioner's cost of service taxes improperly paid by Petitioner under the Tennessee Gross Receipts Tax. In fixing just and reasonable rates of a natural-gas company subject to its jurisdiction, the Commission is required to exclude from the company's cost of service unjustified or improper items of expense. The tax paid under the Tennessee statute is an improper item of expense, since, as appears from the face of the taxing statute, the tax is inapplicable to Petitioner. By the statute, the tax is levied upon "[P]ersons engaged in the business of *manufacturing* gas or of *distributing manufactured gas* or *natural gas* * * *"; and the statute expressly declares that "It is the intention of this item to levy a tax for the privilege of engaging *in intrastate commerce* carried on wholly within this state and not a part of *interstate* commerce." Petitioner does not come within any of these classes. Petitioner does not manufacture gas. Petitioner is not a distributor of manufactured or natural gas. And Petitioner's transportation and sale of natural gas for resale is entirely in interstate commerce, as Petitioner admits and as the Commission has twice determined.

Additionally, the Tennessee Supreme Court has ruled that this very statute does not apply to a company making sales of out-of-state gas for resale within Tennessee. *Memphis Natural Gas Company* v. *McCanless* (Gross Receipts Tax case), 180 Tenn. 688, 177 S. W. 2d 841 (1944), cert. denied, 323 U. S. 785. The court there held that the statute was intended to apply to distributors of natural gas or those distributing natural gas in Tennessee, as distinguished from an interstate pipeline transmission company making wholesale sales for resale to a distributor, since the sales of the former had been held to be intrastate, whereas those of the latter were viewed as interstate; and the Tennessee legislature intended to preserve this distinction in the statute.

In view of these facts, it is clear that, as the Commission found, Petitioner was remiss in failing to protest the tax and seek a judicial determination as to its liability for it, as permitted by Tennessee law. Since a natural-gas company is entitled to recover from the consumer, in addition to a fair return, only those operating expenses reasonably and prudently incurred in rendering the public utility service, it follows that this was not an allowable item of cost. Accordingly, the Commission was required to disallow this expense, so that no improper cost would be passed on to the consumer in the form of increased rates. Instead, the burden of this unjustified expense, since paid gratuitously, must be borne by the shareholders.

Further in support of its exclusion from Petitioner's cost of service of the tax paid under the Tennessee statute, the Commission disallowed the claimed expense on the ground that it would impose on the rate payers in Nashville, Tennessee, an added tax and duplicate cost resulting from the ownership and operation of the pipeline by a separate corporate entity, and that this double exaction from the rate payers was contrary to the public interest. The interposition of Petitioner and its pipeline between Tennessee Gas Transmission, Petitioner's supplier of gas, and Petitioner's wholly owned subsidiary, Nashville Gas, the distributing company supplying ultimate consumers in Nashville and environs, provides the basis for a double imposition of the tax—once on the receipts received by Petitioner from its wholly owned subsidiary Nashville Gas; and once again on the sales by Nashville Gas to the ultimate consumers in Nashville and environs. It is inequitable, contrary to sound public utility regulations, and contrary to the public interest, to require the consumers to pay the tax twice, since the Gross Receipts Tax is by its very nature a tax on the business of distributing gas, and the very connotation of distribution is the ultimate sale to the consumer.

Moreover, although, contrary to Petitioner's assumption the Commission did not place its reliance upon any condition in excluding the claimed cost, it was the envisage of just such a situation as that presented here which caused the Commission to put Petitioner on notice in its certificate order initially authorizing Petitioner's natural-gas service that such an item of cost "would not constitute a reasonable element in the cost of such gas to the consumer of Nashville, Tennessee."

Petitioner's argument that the exclusion from its cost of service of the Tennessee Gross Receipts Tax contravenes the provisions of the Act requiring the Commission to allow "just and reasonable rates" since disallowance of this expense reduces its rate of return to 3.2% instead of the 6% allowed, is premised on the conclusion that such costs were proper, which is the very question in issue. Although Petitioner's figure of 3.2% is in error and should be 4.29%, the error is immaterial since the principle in question is the real issue. Respondent shows that the costs were not proper (*infra,* pp. 9–16); that under the Act and judicial decisions, the Commission was required to disallow such improper costs (*infra,* pp. 16–17); that the risk involved in the payment of improper costs must fall on the shareholder and not on the rate payer (*infra,* p. 17); and that with such costs properly excluded Petitioner's rate of return is a full 6%.

ARGUMENT

I. The Commission's disallowance of taxes paid by Petitioner under the Tennessee Gross Receipts Tax was proper since the Tennessee statute by its express terms and as construed by the Tennessee court of highest jurisdiction is inapplicable to Petitioner's interstate sales of natural gas to Nashville Gas for resale

This case involves $30,456, which is the amount of tax paid by Petitioner under the Tennessee Gross Receipts Tax for the year 1953, on revenue received for gas sold by Petitioner to Nashville Gas.[6] The sole and only question presented is whether this amount and this tax is properly a part of the cost of service which Petitioner is entitled to recover through rates covering sales of natural gas to Nashville Gas. It is Respondent's position that the Commission is required by the proper exercise of its functions in fixing just and reasonable rates under the Natural Gas Act to exclude from the utility's cost of service unjustified or improper items of expense; and that the payment of the Tennessee Gross Receipts Tax is an unjustified and improper item of expense, since the statute by its express language, and as construed by the Tennessee court of highest jurisdiction, is inapplicable to interstate sales of natural gas by Petitioner. Furthermore, Petitioner failed to avail itself of established state procedures to definitely determine its tax liability under the statute in question.

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[6] The total Tennessee Gross Receipts Tax paid by Petitioner for the calendar year 1953, was $38,914. This includes $8,458 paid on sales to DuPont, which sales are not involved in this proceeding (see *supra,* p. 3).

A. The Tennessee Tax Statute on its face and as construed by the Tennessee Supreme Court is inapplicable to Petitioner

A mere reading of the Tennessee Gross Receipts Tax Act shows clearly on its face that it is inapplicable to Petitioner. The portion of the Tennessee statute under which Petitioner paid the tax provides as follows:

> Persons engaged in the business of *manufacturing* gas or of *distributing* manufactured gas or natural gas shall, in lieu of the foregoing, pay an amount equal to one and one-half percent (1½%) of the gross receipts derived from *intrastate* business in this state * * *.
>
> It is the intention of this item to levy a tax for the privilege of engaging in *intrastate* commerce carried on wholly within this state and *not a part of interstate commerce.* [Emphasis supplied.]

Petitioner does not come within any of the statutory classes on whom the tax is levied. Petitioner does not manufacture gas. Petitioner is not a distributor of manufactured or natural gas.[7] Petitioner's transportation and sale of natural gas for resale is entirely in interstate commerce.[8] *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464 (1950); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., et al.*, 314 U. S. 498 (1942). In the latter case, the Supreme Court of the United States held that Illinois Natural Gas Company which received out-of-state natural gas and resold that gas at wholesale for resale and for ultimate distribution and consumption within the same state was engaged in interstate commerce. Not only is Petitioner admittedly a "natural-gas company" engaged in the interstate transmission and sale of natural gas for resale,[9] but it is not engaged in the business of distributing gas in intrastate commerce, to which the statute specifically applies.

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[7] As mentioned above, the rates and charges for gas sold for direct sale to DuPont, and not for resale, are not subject to the rate regulation of the Commission.

[8] 4 F. P. C. 1127 (1945); 9 F. P. C. 912 (1950).

Furthermore, the Tennessee Supreme Court has ruled that this very statute does not apply to a company engaged in making sales of out-of-state gas for resale within Tennessee. *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. 688, 177 S. W. 2d 841 (1944), cert. denied, 323 U. S. 785. The court there found (177 S. W. 2d at 842):

> The gas moves in a continuous flow from Louisiana to the points in Tennessee where the service pipes of the distributing agencies connect with the pipes of the complainant [the "natural-gas company"]. Pressure is reduced at those points and the gas entering the service pipes of the other concern is measured at such places. The distributing agencies pay the complainant for the gas taken by them at these various connections and the complainant has nothing to do with the distribution and sale of the gas by such agencies.
>
> Upon these facts we do not think it can be said that the complainant is distributing natural gas or is a distributor of natural gas in Tennessee. The Supreme Court of the United States has had frequent occasion in recent years to consider the tax liability to the different States of those engaged in the transmission and distribution of natural gas. In general, under the decisions of that Court, the transmission of natural gas from one State to another and its sale at wholesale at the State of destination has been held to be interstate commerce upon which the States could lay no burden. If the interstate carrier, however, undertook in the State of destination to distribute and sell the gas at retail, the latter activity was said to be local in its nature and not pro-

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[9] "Tennessee Natural Gas Lines, Inc. does not own or operate any system for the distribution of gas" (Jt. App. 42A).

tected as interstate commerce. Of course a service company which took the gas from the pipes of the interstate carrier and sold and distributed the same was liable to State taxation and regulation.

The situation with which we are here concerned is identical with that which was before the Supreme Court of Tennessee in the *McCanless* case. Here as there the natural gas moves at high pressure from the Gulf Coast area of the United States across state lines into Tennessee. There the interstate pipelines were under one ownership. Here there is divided ownership (Tennessee Gas Transmission and Petitioner) but the movement is in one continuous stream at high transmission pressures. In both instances the sale and delivery at the point where the interstate transmission lines connect with the distribution lines the transmission pressure is reduced to distribution pressure. Only at this point does distribution begin. In this case Nashville Gas is the distributor. Petitioner is not a distributor and is not liable for the Tennessee Gross Receipts Tax under the decision of the Supreme Court of Tennessee in the *McCanless* case.

The problem here is not whether the State of Tennessee has the power to tax the gross receipts of Petitioner, as Petitioner apparently believes (Pet. Br. 19).[10] The issue is far simpler. It is concerned with the question whether Petitioner comes within the express ambit of the Tennessee Gross Receipts Tax, as intended by the Tennessee legislature. As the *Memphis Natural Gas Company* v. *McCanless* opinion of the Supreme Court of Tennessee recognizes, long before the Gross Receipts Tax was enacted in 1939, the distinction between interstate wholesale sales or interstate sales for resale and intrastate distribution sales was well known and understood. *McCanless* (Gross Receipts Tax case), 177 S. W. 2d at 843.[11] The leading cases[12] dealing with the inability of states to regulate wholesale sales for resale cited in the *McCanless* (Gross Receipt Tax case) opinion were the self-same cases relied on by Congress in its determination to fill the "gap" which existed respecting the interstate transmission and wholesale sale of natural gas by the enactment of the Natural Gas Act.[13] And the Tennessee legislature was aware of these leading cases, as the court mentions, in passing the gross receipts tax. Thus, the important matter here is not whether Tennessee may regulate or tax such sales for resale under the commerce clause of the Constitution, but the fact that, as the Tennessee Supreme Court has already recognized, the United States Supreme Court cases on state regulatory jurisdiction made plain the distinction in operations between interstate transmission and sales for resale, on the one hand, and intrastate distribution on the other, so that the words in the Tennessee Gross Receipts Act "persons engaged in the business of * * * distributing * * * natural gas" in intrastate commerce had a well-defined and unambiguous meaning. This was clearly expressed in the court's opinion in the *McCanless* case, 177 S. W. 2d at 843:

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[10] See *Memphis Natural Gas Co.* v. *McCanless* (Excise Tax case) 180 Tenn. 695, 177 S. W. 2d 843 (1944), upholding the right of the State to assess an excise tax on interstate natural-gas companies on business done within the State. The taxes paid by Petitioner under the excise tax statute have been included in Petitioner's cost of service without question (Jt. App. 64A).

[11] There are two cases decided the same day by the Supreme Court of Tennessee: (1) *Memphis Natural Gas Company* v. *McCanless* (Gross Re-

> These decisions were familiar. It was understood from them that the transportation of natural gas from another State and its sale at the carrier's pipe to another was *interstate commerce*. But that the *distribution* of gas through service pipes in a particular locality and sale at the burner tips was *intrastate* commerce. That distributing the commodity was a local activity. *It was well understood what the term distributor meant* and we do not think that the complainant here was a dis-

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ceipts Tax case) 177 S. W. 2d 841; (2) *Memphis Natural Gas Company* v. *McCanless* (Excise Tax case) 177 S. W. 2d 843.

[12] *Public Utilities Commission* v. *Landon*, 249 U. S. 236; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1924); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). In discussing these earlier cases in the *East Ohio* case, *supra*, the Court concluded (338 U. S. at 470):

"Thus, when the Natural Gas Act was passed [1938] this Court's decisions had already resulted in a sharp cleavage between local distribution facilities and high-pressure pipe lines serving those facilities."

[13] *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 682–684; cf. *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464, 469–474.

> tributor or was distributing natural gas in the sense of the statute * * *. [Emphasis supplied.]

The Tennessee court also held that under the Tennessee statute payment of the tax by the distributing company part of a distributing company-transmission company joint enterprise engaged in supplying gas to local consumers satisfies all liability for the tax by both parts of the enterprise. Earlier mentioning in its opinion that the municipally-owned distributing company serving Memphis and vicinity had formerly constituted a privately-owned corporation called the Memphis Power and Light Company and had engaged with Memphis Natural in the "joint enterprise of distributing natural gas" (pp. 842, 843), the court held (p. 843):

> We do not think there is any liability on the part of the complainant [Memphis Natural] for the gross receipts tax during the time in which gas was being distributed as a joint enterprise by complainant and Memphis Power and Light Company. It appears that *the tax was paid during those years by Memphis Power and Light Company and the enterprise being joint, a sort of partnership, only one tax was due.* Only a single tax on the utility pursuing the activity. [Emphasis supplied.]

The construction of a state statute by the highest court of the state is binding as to its proper interpretation on the federal courts.[14] Respondent submits that the construction of the Tennessee statute by the Tennessee court of highest jurisdiction requires the conclusion that Petitoner is not liable for the Tennessee Gross Receipts tax. It follows that this is not an item of "cost" to Petitioner as a "natural-gas company" in supplying natural gas to Nashville Gas for sale and distribution in the city of Nashville and environs. It follows further that the Commission properly excluded this claimed cost in determining Petitioner's cost of service on which just and reasonable rates are based.

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[14] *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 433 (1951); *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 50 (1941).

Petitioner itself recognizes the force of the *McCanless* decision on its liability under the Gross Receipts Tax law. It itself in a letter to the Attorney General of Tennessee contended that it was not a distributor of natural gas and was not engaged in distributing natural gas in intrastate commerce "as such terms are used in the statute" (Pet. Br. 6). Petitioner's sole excuse in paying the Gross Receipts Tax is that it was "forced" to pay this tax (Pet. Br. 8) "under compulsion" (Pet. Br. 13). The evidence in this record is that Petitioner is no more "forced" or "under no more complusion" to pay this tax than is any taxpayer called upon to pay a tax for which it is not liable under a taxing statute. In the generic sense used by Petitioner, all taxes are "forced" and paid "under compulsion" so long as the tax statutes contain penalties for failure to pay the tax. The fact is that the tax statutes in Tennessee, as admitted by Petitioner, provide a remedy for the recovery of taxes illegally exacted and improperly assessed, and Petitioner has never availed itself of that remedy (Pet. Br. 8).

The only excuse which can be gleaned from the record for Petitioner's payment of the Tennessee Gross Receipts Tax is an exchange of correspondence with the Attorney General of the State in January 1948 (Jt. App. 41A–51A). The attorney for Petitioner wrote to the Attorney General making the same contentions which are applicable here, citing from the *McCanless* case the same quotations hereinbefore recited in support of our position and insisting that Petitioner was not engaged in the *distribution* of natural gas; that it was not engaged in intrastate commerce; and that the payment of the tax by its wholly owned subsidiary Nashville Gas "results in double taxation upon the distribution of gas to the city of Nashville, which was not intended by the statute" (Jt. App. 43A). The Attorney General replied that he was unable to agree with the conclusions of Petitioner's attorney. We do not propose to discuss the contentions of the Attorney General.[15]

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[15] For instance, the Attorney General's attempt to distinguish the *McCanless* case from the instant case on the ground that Memphis Natural transported the gas from Louisiana to Tennessee, is completely answered by the *East Ohio* and *Illinois Natural* cases, *supra*, p. 9. In addition, we have made it plain that the power of the state to tax Petitioner despite the commerce clause is not in issue, and that *Memphis Natural Gas Co.* v.

They are plainly refuted by the wording of the statute in question and the *McCanless* cases. Aside from alleged negotiations with the Attorney General, the nature of which is not shown by the record (Jt. App. 55A), the only apparent basis for the payment of the tax by Petitioner is the acceptance by Petitioner of the letter of reply from the Attorney General as finally determinative of its liability for the Gross Receipts Tax (Pet. Br. 17). The plain fact is that the determination or decision of the Attorney General, contrary to the plain law in the case and contrary to the contentions advanced by Petitioner to the Attorney General, has never been contested (Jt. App. 54A–55A), although Petitioner admits that an adequate remedy exists to contest the Attorney General's determination (Pet. Br. 17).[16]

In these circumstances, the Commission was entirely justified in concluding that Petitioner "has been remiss in failing to contest the matter in the appropriate courts" and disallowing this item of claimed cost to Petitioner (Jt. App. 79A). We do not intimate that every tax must be litigated by the utility in order to be allowed in the cost of service. As indicated hereinbefore, all taxes, including federal income taxes, were allowed in the cost of service (Jt. App. 64A). The important point here is that the company was not ignorant of the fact that it was not liable for the Gross Receipts Tax; that it made the same contentions, citing the same cases as we do here; and yet for reasons best known to it, submitted to the demands of the taxing authorities. The facts and applicable conclusions of law based on those facts make it abundantly clear that the Com-

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McCanless, 177 S. W. 2d 843 (the Excise Tax case) is the case upholding the right of the State of Tennessee even under the commerce clause to levy an excise tax on interstate companies on business done within the state, whereas *Memphis Natural Gas Co.* v. *McCanless*, 177 S. W. 2d 841 (the Gross Receipts Tax case) determines the narrow issue of the meaning of "distribution" and "interstate commerce" under the Gross Receipts Tax Statute, which is altogether another and different levy from the excise tax considered in 177 S. W. 2d 843.

[16] Petitioner contends that Respondent "apparently felt that its own construction of the Tennessee taxing statute carried far greater weight than did the opinion of the Attorney General" (Pet. Br. 18). This contention is erroneous. Respondent merely applied the clear language of the statute and the decision of the Tennessee court of highest jurisdiction to the facts presented.

mission's determination that Petitioner was remiss in paying the tax in question and that the tax is not a proper and reasonable item in Petitioner's cost of service, was correct. *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690 (C. A. 8, 1953), cert. denied, 346 U. S. 922; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 209 F. 2d 717 (C. A. 10, 1953). The only costs which a regulated utility is entitled to recover from the consumer are those reasonably and prudently incurred. Petitioner has not met that standard.

B. In fixing just and reasonable rates, the Commission must disallow unreasonable and improper costs

All rates and charges in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission must be "just and reasonable," and any rate or charge which is not just and reasonable is unlawful (Section 4 (a)). And constitutional requirements are no more exacting than the standards of the Act. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 607 (1944). Under principles of public utility regulation long recognized and applied by the Commission in determining just and reasonable rates, and approved by the courts, a natural-gas company is entitled to recover from the consumer, in addition to a fair return, only those operating expenses reasonably and prudently incurred in rendering the public utility service. *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 574 (1942); cf. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 68 (1935). By the same token, the Commission may not permit the recovery of expenditures which are not reasonable and prudent.[17] Thus the Commission has the duty to disallow costs arising from payment by the utility of taxes under an invalid or inapplicable tax statute. *Lincoln Gas & Electric Light Co.* v. *City of Lincoln,* 182 F. 926 (Cir. Ct. D. Nebraska, Lincoln Division, 1909), reversed on different grounds while upholding the exclusion of taxes under the invalid ordinance, 250 U. S. 256, 267; *Cities Service Gas Co.* v. *F. P. C.,* 155 F. 2d 694, 704 (C. A. 10, 1946), cert. denied, 329 U. S. 773; *Logansport* v. *P. S. C. Ind.,* 202 Ind. 523, 177 N. E. 249, 257 (S. Ct. Ind., 1931); *Charleston* v. *Public Service Commission,* 95 W. Va. 91, 120 S. E. 398, 412 (S. Ct. of App. of W. Va., 1923); *Arkansas-Louisiana Gas Co.* v. *City of Texarkana,* 17 F. Supp. 447, affirmed, 96 F. 2d 179 (Dist. Ct. W. D. Ark., Texarkana Div., 1936), cert. denied, 305 U. S. 606.

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[17] *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 209 F. 2d 814 (1954); *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 89 App. D. C. 235, 248, 193 F. 2d 230, 243 (1951); *Safe Harbor Water Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 199–200 (C. A. 3, 1949), cert. denied, 339 U. S. 957; *Pennsylvania Power & Light Company* v. *Federal Power Commission*, 139 F. 2d 445 (C. A. 3, 1943); *Re Mississippi River Fuel Corp.*, 4 F. P. C. 340, 347, affirmed on this issue, *sub. nom.*, *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 82 App. D. C. 208, 224–225, 163 F. 2d 433, *Pittsburgh* v. *Pittsburgh & West Virginia Gas Co.*, 8 F. P. C. 262, 270.

Moreover, when a utility pays unreasonable, excessive or improper costs, such as costs resulting from the payment of taxes under invalid or inapplicable tax statutes, the Commission must disallow all such expense so that no improper costs may be passed on to the consumer in the form of increased rates. Instead, the burden of such unjustified expense, if paid, must be borne by the shareholders. *Chicago Railway Co.* v. *Wellman,* 143 U. S. 339, 345–346 (1892); cf. *West Ohio Gas Co.* v. *P. U. C.,* 294 U. S. 62, 72; *Charleston* v. *Public Service Commission,* 120 S. E. 398 (1923); *Re Rates & Rate Structure,* 1 P. U. R. (N. S.) 113 (N. Y., 1933); *Re Rochester Gas & Electric Corporation,* 4 P. U. R. (N. S.) 513, 522 (N. Y., 1933); *Re Westchester Lighting Company,* 15 P. U. R. (N. S.) 299, 316 (N. Y., 1936); *Re Brooklyn Borough Gas Company,* 21 P. U. R. (N. S.) 353 (N. Y., 1937).

No one can rightfully dispute these fundamental and elementary principles of rate making. Petitioner is excluded from the applicability of the Tennessee Gross Receipts Tax by its clear and explicit terms. Furthermore, Petitioner has been derelict in failing to assert its rights under the tax law and the expense resulting from the improper payment of any such tax may not be recouped from ultimate consumers in Nashville and environs through increased rates.

II. Payment by Petitioner of the Tennessee Gross Receipts Tax constitutes an unwarranted double exaction from the rate payers contrary to the public interest

In addition to its finding that Petitioner failed to act reasonably and prudently, the Commission made a further finding in support of its conclusion that the payment of the Tennessee Gross Receipts Tax is not a proper part of the cost of service to be exacted from rate payers. As a matter of sound public utility practice and regulation, the Commission excluded the claimed expense on the ground that it constituted a double tax exaction from the rate payers and was thus contrary to the public interest (Jt. App. 79A–80A). The record is clear that the interposition of Petitioner and its pipelines between the source of gas for Nashville, that is between the pipelines of Tennessee Gas Transmission Company, and the distribution facilities in Nashville owned and operated by Nashville Gas Company, provided the basis for a double imposition of the Gross Receipts Tax—once, on the receipts received by Petitioner from Nashville Gas for the sale of the gas to Nashville Gas and, secondly, on the recipts received by Nashville Gas from the sale of the same gas to the ultimate consumers in Nashville. To allow this item as expense in Petitioner's cost of service means that the tax would be collected in the rates paid by Nashville Gas,[18] and Nashville Gas would in turn include the tax thus paid in its cost of service to be recouped from the ultimate rate payers in Nashville as well as the amount of the Gross Receipts Tax computed on its own receipts[19] which it must rightfully pay. Petitioner itself recognized this inequity in its letter to the Attorney General where Petitioner said (Jt. App. 43A): "Payment of the tax by Tennessee Natural Gas Lines, Inc., in addition to payment of the tax by its wholly owned subsidiary, Nashville Gas and Heating Company, results in double taxation upon the distribution of gas to the City of Nashville, which was not intended by the statute." Since the Gross Receipts Tax is by its very nature a tax on the business of distributing gas, it is inequitable that the consumers should be called upon to pay the tax twice, for the very connotation of distribution means the ultimate sale to the ultimate consumer.

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[18] The sole difference between the rate fixed by the Commission in the order under review and that contended for by Petitioner is made up entirely by the amount of the Gross Receipts Tax which Petitioner has been paying (Jt. App. 5A).

[19] Of the total Gross Receipts Tax of $38,914 paid by Petitioner in 1953, $30,456 is directly attributable to the sale for resale to Nashville Gas and the balance to the sale to DuPont. There is no double taxation of the Gross Receipts Tax so far as the DuPont sale is concerned since that is a direct sale to DuPont which consumes the gas in its industrial plant.

Petitioner admits that but for its interposition between Tennessee Gas Transmission Company and Nashville Gas Company only one Gross Receipts Tax would be involved (Jt. App. 55A–57A). And it was the envisage of just such a situation as this which caused the Commission to put Petitioner on notice that such an item of cost "would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee," *Re Tennessee Natural Gas Lines, Inc., et al.,* 4 F. P. C. 1127, 1129, when the Commission initially issued its certificate of public convenience and necessity to Petitioner. In issuing that certificate the Commission found that the fact that ownership and operation of the line between Tennessee Gas Transmission and Nashville Gas by someone other than Tennessee Gas or Nashville Gas would result in some excessive costs which because of their nature should not be borne by the ultimate consumers of gas in Nashville. The pertinent provision of the Commission order after making the foregoing finding reads as follows (4 F. P. C. 1127, 1129):

> (A) A certificate of public convenience and necessity be and it is hereby issued authorizing the construction and operation by the applicant of the proposed facilities referred to in paragraph (a) (1), above, and more fully described in the application in this proceeding for the transportation of natural gas therein set forth subject to the jurisdiction of the Commission upon the terms and conditions of this order, *provided,* that the rates and charges of applicant for sale of gas to Nashville Gas shall be approved in advance by this Commission and shall not include costs other than are found to be just and reasonable;

The Gross Receipts Tax here involved is peculiarly and particularly just such a type of excessive cost which would not be encountered if either Tennessee Gas Transmission or Nashville Gas owned and operated the connecting stub line.[20] And in the order under review the Commission expressly found that such a double tax was just the kind of cost envisaged in its certificate order to be excluded from the cost of service. The Commission there found (Jt. App. 79A–80A) that:

> [T]o permit the tax to be included in Tennessee Natural's cost of service would impose on gas consumers in the city of Nashville an *added* tax and *duplicate* cost resulting solely from the ownership and operation of the pipeline *by a separate corporate entity.* * * * we find that this is contrary to the public interest. [Emphasis supplied.]

In these circumstances it is not correct to say, as Petitioner contends (Pet. Br. 24) that, "Whoever had built the line, it is perfectly apparent that the costs incident thereto would have been allowed in that company's rate base." For, although the Commission has included in the allowed cost of service all proper costs of the line, it has excluded the additional cost of the Gross Receipts Tax resulting from the dual ownership of the connecting line which would not be incurred but for Petitioner's operation and ownership of the line. And this was proper, since if either Nashville Gas or Tennessee Gas Transmission Company had built the line, on Petitioner's assumption (Pet. Br. 24), the additional Gross Receipts Tax would not have been incurred and, therefore, would not be part of the cost of service, according to Petitioner's own admission (Jt. App. 57A).

The exclusion of the Gross Receipts Tax is proper, therefore, not only because it is inapplicable to Petitioner, but because there was substantial evidence warranting the Commission's finding that the inclusion of this item would result in a double cost to the consumers which arises solely from the ownership and operation of the connecting line by Petitioner and reselling the gas to its wholly owned subsidiary.

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[20] In *Memphis Natural Gas Co.* v. *McCanless* (Gross Receipts Tax case), *supra*, the Court concluded its opinion with the statement: "It appears that the tax was paid during those years by Memphis Power and Light Company and the enterprise being joint, a sort of partnership, only one tax was due. Only a single tax on the entity pursuing the activity."

Petitioner contends that the exclusion of the Gross Receipts Tax from its cost of service results in reducing its rate of return to 3.2%, instead of the 6% allowed (Pet. Br. 28), and that this contravenes the provisions of the Act requiring the Commission to allow "just and reasonable" rates. The computation made by Petitioner in the appendix to its brief (Pet. Br. 31–32) is not accurate. The correct return on Petitioner's assumption would be 4.29%. But aside from Petitioner's miscalculation of the resulting rate of return to it, what is important is that Petitioner misconstrues the principles of rate regulation involved in the exclusion of the Gross Receipts Tax from the cost of service. If the claimed costs were improper, as we have shown, there is absolutely no justification for including such tax as expense in the cost of service. Thus, Petitioner's argument is premised on the assumption that the costs were proper, which is the very question in issue. As to this question, respondent submits that the costs were not proper and for this reason the Commission correctly excluded them. With such costs excluded Petitioner's rate of return is a full 6%.

Nor is there equity in Petitioner's offer to now contest the Tennessee Gross Receipts Tax but to collect the tax from the ratepayers in the interim with an offer to refund the tax if it is successful. Petitioner had the duty and the responsibility to contest that tax six or seven years ago when it first paid the tax (Jt. App. 60A, 78A). The State of Tennessee then as now provided protective statutes to enable taxpayers to test the legality of any tax which the taxpayer might question. There is no justifiable reason for shifting the burden of Petitioner's delay in testing the applicability of the Tennessee Gross Receipts Tax so that consumers of natural gas in Nashville will continue to pay an improper tax while Petitioner belatedly pursues what now it recognizes as its responsibility to test the applicability of the tax in the proper Tennessee courts.

CONCLUSION

The Commission's determination that the Tennessee Gross Receipts Tax is not a proper item of cost upon which to base just and reasonable rates is supported by the plain and unambiguous language of the Tennessee statute, as judicially interpreted by the highest court of the State. Petitioner has been remiss in not asserting its known rights and contesting the tax. Further, the allowance of this improper tax in Petitioner's cost of service would result in a double tax imposition on the rate payers. Accordingly, the Commission's order under review disallowing the Tennessee Gross Receipts Tax, should be affirmed.

Respectfully submitted.

WILLARD W. GATCHELL,
General Counsel,
LAMBERT MCALLISTER,
Assistant General Counsel,
PASCAL B. FRAZIER,
LOUIS FLAX,
Attorneys,
Counsel for Respondent, Federal Power Commission.

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United States Court of Appeals
For the
District of Columbia Circuit

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No. 12,249

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNESSEE NATURAL GAS LINES, INC., *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*, and, TENNESSEE RAILROAD AND PUBLIC UTILITIES COMMISSION, and THE CITY OF NASHVILLE, *Intervenors*.

BRIEF OF THE CITY OF NASHVILLE, AN INTERVENOR

A. Yates Dowell
A. Yates Dowell, Jr.
1158 Munsey Building,
Washington 4, D. C.

BENSON TRIMBLE,
Special Counsel,
537 Third National Bank Building,
Nashville 3, Tennessee.

Of Counsel,
STOKES & TRIMBLE,
537 Third National Bank Building,
Nashville 3, Tennessee.

RICH PRINTING CO. — NASHVILLE

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BRIEF OF THE CITY OF NASHVILLE, AN INTERVENOR

BENSON TRIMBLE,
Special Counsel,
537 Third National Bank Building,
Nashville 3, Tennessee.

Of Counsel,
STOKES & TRIMBLE,
537 Third National Bank Building,
Nashville 3, Tennessee.

RICH PRINTING CO. — NASHVILLE

INDEX

PAGE

STATEMENT OF QUESTIONS PRESENTED AND COUNTER-STATEMENT 1

SUMMARY OF ARGUMENT 2

Contention No. 1 2

Contention No. 2 2

ARGUMENT 4

Contention No. 1 4-10

Contention No. 2 11-17

CONCLUSION 18

TABLE OF CASES

Department Of Public Service Of Washington vs. Pacific Telephone & Telegraph Company, 37 P. U. R. NS 321 . 13

Lincoln Gas and Electric Company vs. Lincoln, 182 Federal Reporter 926 4

Memphis Natural Gas Company vs. McCanless, 180 Tennessee Reports 688; 177 S.W. 2d 841 .... 6, 7, 8, 10

Re Capitol City Water Company, 8 Mo. P.S.C.R. 336 8

Re Citizens Utilities Company of California, 1 P.U.R. 3rd 244 4

Re Illinois Bell Telephone Company, 92 P.U.R. NS 164 13

Re Niagara Frontier Transit System 9

Reno Power, Light & Water Company vs. Public Service Commission, 298 Federal Reporter 790 14

San Diego Land & Town Company vs. Jasper, 189 U.S. 439 14

STATUTES AND FEDERAL POWER COMMISSION ORDERS

Pertinent Portion of F.P.C. Order Issued April 16 ,1954 11-12

Pertinent Portion of F.P.C. Order Issued in re: Docket No. G-575 ---------- 15-16

Act of June 21, 1938—Natural Gas Act, 15 U.S.C. 717 R (a) and 717 R (b), (pertinent parts thereof) 16, 17

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Intervenors.

BRIEF OF THE CITY OF NASHVILLE, AN INTERVENOR

STATEMENT OF QUESTIONS PRESENTED

The statement of questions presented is accurately set forth in the brief of the petitioner, and same need not be reiterated herein. Neither is there a need for a counter-statement.

SUMMARY OF ARGUMENT

Contention No. 1

Beginning shortly after its incorporation in 1948 the petitioner has voluntarily paid to the State of Tennessee an annual gross receipts tax. Petitioner experienced doubt as to the validity of this tax, but has failed, and/or, neglected to pursue its only course of action to receive a legal determination of its validity, i.e., pay said tax under protest and then resort to the Courts of the State of Tennessee for said legal determination. It is incumbent upon petitioner, as a public utility corporation, to exhaust all remedies afforded it by law, in order to provide a more economical operation, and thereby save the rate payers as much as possible. By the failure, and/or, neglect of petitioner, to pursue its legal remedies, it has demonstrated a lack of managerial prudence consistent with that required of a public utility corporation. Petitioner, therefore, cannot be heard to have this amount computed within its cost of service.

Contention No. 2

The petitioner owns all of the capital stock of its subsidiary the Nashville Gas Company. Petitioner transports gas from the lines of its furnisher and delivers said gas to its subsidiary for distribution to the rate payers of the City of Nashville. Petitioner and its subsidiary, due to the dual corporate entity created, both pay a gross receipts tax on the identical gas, for an identical period of time. If the parent and subsidiary merged there would be paid only one gross receipts tax on said gas. Therefore, due to a lack of managerial prudence consistent with that required of public utility corporations, petitioner creates an undue burden on the rate payers of the City of Nashville, which cannot be allowed to exist, as this end result is contrary to the dictates of the Natural Gas Act, which was conceived for the express purpose of protection of rate payers from exploitation at the hands of natural gas corporations.

This intervenor cares not that the dual entity is contined for reasons of gain, and/or, benefit to individuals that serve as officers of both corporations, but said dual entity must be managed and conducted in such a manner as not to be oppressive as to the rate payers of said City of Nashville.

ARGUMENT

Contention No. 1

It is generally accepted by all courts that any valid legal tax imposed upon a public utility may be considered as a part of said utilities cost of service and included within same for rate fixing purposes, *Lincoln Gas and Electric Company* vs. *Lincoln,* 182 Federal Reporter 926.

It is also generally accepted and recognized that the burden of proof is upon the public utility company and it must show the propriety of a rate increase and all integral inclusions and exclusions in its cost of service that might substantiate said increase "*re Citizens Utilities Company of California* (1953), 1 PUR 3rd. 244.

In view of the above recognized law we must now look to the record in this cause in an attempt to determine if, first of all, the Tennessee gross receipts tax is a legal and valid tax as assessed against petitioner, and secondly, what if anything has been done by petitioner to either (a) determine the legality of this tax or, (b) to relieve itself or attempt to relieve itself of this tax if it doubts its validity or if it will be to the best interest of the rate payers to have such a determination. Also it is important that we look to the record in an attempt to determine if petitioner has carried the necessary burden of proof in substantiating the inclusion of the amount paid as gross receipts tax in its cost of service in this cause.

Petitioner at page 13 of its brief and under the paragraph entitled Summary of Argument sets out that "since the year 1948, petitioner has paid to the State of Tennessee the gross receipts tax under compulsion and to avoid a levy upon its property". An examination of the record contained within the joint appendix fails wholly to show that any such evidence was produced at the hearing of this cause. In other words there was absolutely no compulsion on the part of petitioner shown at the hearing of this cause insofar as the payment of this tax is concerned.

It does appear that petitioner, through its duly elected officials, did carry on some correspondence with the tax collecting officials of the State of Tennessee and also held one or two conferences in regard to petitioner's liability for this tax, (app. 53A et seq). Insofar as these conferences are concerned Mr. Thomas Goodloe testified on the behalf of petitioner as its only witness to said conferences, that he only attended one such conference in an effort to have petitioner relieved from the payment of said tax, (app. 54A). Also it is shown by the testimony of Mr. Goodloe that the determination on the part of the Attorney General of the State of Tennessee in regard to petitioner's liability for said tax has never been contested by any court action, which of course means that said tax has not been paid under protest and then suit filed in the appropriate Tennessee court to recover said taxation and secure a judicial decree or judgment as to the absolute liability of petitioner to pay said tax, (app. 54A-55A).

It is also conclusively shown that Tennessee Natural, within the terms generally accepted in the industry is a "transmission pipe line company" as opposed to a "distribution company", and that the distribution company in this system is the subsidiary, the Nashville Gas Company, (app. 59A).

The deciding case in this matter is that of *Memphis Natural Gas Company* vs. *McCanless*, (Gross Receipts Tax case) 180 Tenn. 688, 177 S.W. (2nd) 841, decided by the Supreme Court of the State of Tennessee on February 5, 1944, in which the Court held in part as follows:

> "1. Taxation.
>
> A pipe line company delivering natural gas from another state to independent distributing agencies within the state was not 'distributing natural gas' within statute imposing tax for privilege of doing business.
>
> "2. Taxation.
>
> An isolated sale of gas by interstate pipe line company to customer within state pursuant to contract did not make company a 'distributor' of natural gas within statute imposing tax for privilege of doing business.
>
> "3. Taxation.
>
> Where distribution of natural gas was a joint enterprise carried on by interstate pipe line company and domestic company, only a single tax for privilege of doing business was due and where paid by domestic company it could not be collected from pipe line company."

In discussing the Tennessee Gross Receipts Tax as it applied in 1944, and as it now applies in 1954, to the operations of Petitioner, that being the case at bar, at Page 842 of the above cited Southwestern Reports (2nd Series), the Supreme Court of the State of Tennessee through Chief Justice Green held the following:

> "It will be observed with respect to natural gas that the tax is only levied on 'distributing * * * natural gas'. The case before us, therefore, is in a narrow compass, a determinative question being whether the complainant is distributing natural gas, or is a distributor of that commodity in Tennessee."

In the discussion of the operation of the gas company by Chief Justice Green, he points out the following:

> "The gas moves in a continuous flow from Louisiana to the points in Tennessee where the service pipes of the distributing agencies connect with the pipes of the complainant. Pressure is reduced at those points and the gas entering the service pipes of the other concerns measured at such places. The distributing agencies pay the complainant for the gas taken by them at these various connections and the complainant has nothing to do with the distribution and sale of the gas by such agencies.
>
> "Upon these facts we do not think it can be said that the complainant is distributing natural gas or is a distributor of natural gas in Tennessee. * * * Of course a service company which took the gas from the pipes of the interstate carrier and sold and distributed the same was liable to State taxation and regulation."

And in conclusion, Chief Justice Green stated the following:

> "We do not think there is any liability on the part of the complainant for the Gross Receipts Tax during the time in which gas was being distributed as a joint enterprise by complainant and Memphis Power and Light Company. It appears that the tax was paid during those years by Memphis Power and Light Company and the enterprise being joint, a sort of partnership, only one tax was due. Only a single tax on the entity pursuing the activity."

From the above it is important to examine the managerial prudence exercised by Petitioner in, first of all, paying said tax and secondly, seeking by legal means to be relieved of the payment of said tax. According to the record there was absolutely no compulsion on the part of the petitioner to pay said tax; there were two letters written and only one conference held with the taxing authorities of the State of Tennessee in the full eight year period petitioner has been in operation, and there has never been a payment under protest followed by court action to secure a judicial ruling on the validity of said tax.

It is known to be incumbent upon a public utility company to carry on its operations in an efficient manner and in the case of *Re Capitol City Water Company* (1919) 8 Mo P. S. C. R. 336, the Commission in that regard stated

> "increased operating costs due to inefficient methods cannot be made the basis of higher rates"

also citing re Atlantic County Electric Company, PUR 1918 B589.

Again more succinctly stated in the case of *Re Niagara Frontier Transit System,* Case 14984, January 8, 1952 (rehearing denied February 27, 1952) The Commission stated the following:

> "The Commission is not obligated to grant rate increases for the purposes of defraying expenditures not deemed necessary in the rendition of safe and adequate service . . . "

From these recent decisions it is apparent that it is incumbent upon the public utility corporation to use the most prudent discretion possible in its management and operation. In fairness to all parties, can it be said or even seriously contended on behalf of petitioner, that its officers used prudent managerial discretion in its determination not to contest the validity of the Tennessee Gross Receipt Tax within the only forum open to them, that being the courts of the State of Tennessee? It is felt by the writer that this is untenable and can only be answered in the negative.

It is interesting to note how this matter was approached and casually explained by petitioner in its brief. An examination of Page 17 thereof will shed a small degree of light upon this subject. Contained within the first paragraph on Page 17 of petitioner's brief is the following:

> "The only alternative which this young company had was to pay the taxes under protest and sue to recover. This is the exclusive remedy in

> Tennessee of a tax payer for refund of taxes illegally exacted . . . In good faith, the petitioner decided not to run the risks involved and pay the taxes under compulsion."

So we have as an explanation by petitioner as to why it did not exhaust its legal remedies in regard to the payment of said tax, which it considered illegal, the bland statement that the petitioner decided "not to run the risks involved," but it fails wholly to set out any risks that might accrue or be forced upon the petitioner and none have been shown within this record. Certainly the rate payers of the City of Nashville are entitled to, and guaranteed under the Natural Gas Act, more prudent managerial discretion than has been demonstrated by petitioner.

It is important also to note that the most recent case in the State of Tennessee as to the validity of this tax, to wit, *Memphis Natural Gas Company* vs. *McCanless* sets out clearly and distinctly that the Tennessee Gross Receipt Tax is only levied on companies "distributing natural gas" and as above shown in this brief the petitioner is admittedly a "transmission company" as opposed to a "distribution company." With this admission on the part of petitioner, and with the law as it now is in the State of Tennessee, it is crystal clear that the Tennessee Gross Receipt Tax is invalid and illegal and same should not be allowed to be computed within the cost of service of petitioner in its request for a rate increase merely because it is voluntarily paid.

Contention No. 2

From the record we determine that the petitioner owns all of the capital stock of the Nashville Gas Company (earlier known as the Nashville Gas and Heating Company) and that relationship has been in existence shortly after the inception of petitioner, (app. 53A). Also that both companies have been paying this identical tax since the inception of petitioner, (app. 53A). Further it is evident that only because of the dual corporate entity, i.e., petitioner being the parent and the Nashville Gas Company being the subsidiary, said tax is paid twice on the identical flow of gas during an identical period of time. It follows that if there was a merger of this parent-subsidiary relationship there would only be one Tennessee Gross Receipts Tax liability, (app. 56A, 57A).

In sustaining the contention of the City of Nashville below, the Federal Power Commission stated the following, (Page 16A of the Appendix)

> "From our study of the situation, two conclusions seem abundantly clear. First, there is serious question of the liability of Tennessee Natural for the payment of the Gross Receipts Tax, and Tennessee Natural has been remiss in failing to contest the matter in the appropriate courts. Secondly, and more important to the decision at hand, the payment of the Gross Receipts Tax by both Tennessee Natural and Nashville Gas, in any event, results from the dual corporate identity of the single enterprise transporting gas to and distributing gas in the City of Nashville. It was the possibility of just such a circumstance as this which prompted us to find in the first cer-

tificate of public convenience and necessity issued Tennessee Natural that:

> "(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas (Transmission Company) or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.
>
> "(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1) above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned. In the Matter of Tennessee Natural Gas Lines, Inc., and Tennessee Gas and Transmission Company, Docket No. G-575 (4 F.P.C. 1127, 1129 (1945)".

And by further examination we find the importance to which the Federal Power Commission attached the existence of this dual corporate entity to this particular application for rate increases as at Page 17A 3rd paragraph of the appendix we find the following:

> "To permit the Tax to be included in Tennessee Natural's cost of service *would impose on gas consumers in the City of Nashville an added tax and duplicate cost resulting solely from the ownership and operation of the pipe line by a separate corporate entity.* As at the time of the Docket No. G-575 proceeding, *we find that this is contrary to*

> *the public interest. Accordingly, the Gross Receipts Tax must be eliminated in determining Tennessee Natural's cost of service."*
>
> (Italics ours)

It is abundantly clear that the Federal Power Commission was well within its rights to examine and scrutinize the inter-corporate relationship that existed between petitioner and Nashville Gas Company before making a determination as to the exclusion of the Tennessee Gross Receipts Tax. In the reported case of *Re Illinois Bell Telephone Company* (1951) 92 PUR NS164, it was held

> "that under the consideration of inter-corporate relationship the commission in discharging its statutory obligation in a proceeding to determine rates which are just and reasonable for a utility, which is a part of a nation wide system, must scrutinize carefully not only the operations of the applicant, whose intra-state rates are directly the subject of investigation, but also the interrelations and arrangements between the applicant company and the system of which it is an integral part".

Again in the case of *Department of Public Service of Washington* vs. *Pacific Telephone and Telegraph Company*, 37 PUR NS321 the following was held:

> "Public Utility Companies are required to provide service in a reasonably efficient and economical manner, *and the public cannot be required to pay rates to cover operating expenses in excess of those which would be incurred by a reasonably prudent management*, taking full advantage of savings obviously available through ordinary operation. (Italics ours.)

Again in the case of *San Diego Land and Town Company* vs. *Jasper* (1903) 189US439 the court held as follows:

> "The United States Supreme Court has held that recorded operating expenses for a public utlity enterprise need *not be accepted by regulatory authorities for the purposes of fixing rates in the absence of the showing that such expenses are reasonable in amount.*" (Italics ours.)

Again, in the recent case of *Reno Power, Light and Water Company* vs. *Public Service Commission,* 298 Federal 790, the court very boldly stated the following,

> "The Utility Company should be permitted to earn the cost of operation and a fair return; *but in addition to a fair return it is not entitled to earn whatever it might choose to spend as its expense account is limited to the reasonable cost of operation to the exclusion of expenditures too large or otherwise improper, unjust or unfair to its patrons.*" (Italics ours.)

Petitioner in this cause has chosen of its own volition to operate along with the Nashville Gas Company as dual corporate entities. This choice is unexplained on this record, but judicial notice can be taken in explanation, and that being that two corporations must necessarily have two sets of officers and thereby two sets of salaries are effected. It is well to observe that it matters not to the intervenor that this dual corporate entity exists. If the officers of both corporations choose to continue this imprudent management insofar as the rate payer is concerned, that of course is their business but it is strenuously objected to when this dual corporate entity creates an additional burden and causes the rate payer of the intervenor to pay higher rates than said rate payer would pay if this dual corporate entity did not exist. By the cases above cited it is crystal clear that a public utility corporation is compelled to operate with the highest possible degree of efficiency and upon a prudent basis. Can it be said that petitioner is so operating in view of the record in this cause? It is apparent that this must be answered definitely and positively in the negative.

It is apparent from this record that when Tennessee Natural was granted its original franchise as the result of the case in Docket No. G-575 as reported in 4FPC1127, 1129, the commission was cognizant of this dual corporate entity and the abuses to which it could be put insofar as the rate payer is concerned. The Commission set out certain restrictions at that time which must be observed throughout the continual operation of petitioner. In spelling out these restrictions it said as follows, and in part "(9) By reason of the proposed ownership and operation of the stub line by a corporation other than Tennessee Gas Transmission Company or Nashville Gas, the estimated cost of transportation of the gas over a distance of approximately 14 miles would be excessive and would not constitute a reasonable element in the cost of such gas to the consumers of Nashville, Tennessee.

"(10) The construction and operation by Applicant of the facilities referred to in paragraph (a) (1) above, are and will be required by the present and future public convenience and necessity, provided such excess costs are not charged as a part of the rates and charges to Nashville Gas, and a certificate authorizing such proposed construction and operation, subject to this condition, should be issued as hereinafter ordered and conditioned." This restriction was providently placed in said original franchise for the sole protection of the rate payers of the City of Nashville and in compliance with the Natural Gas Act, especially to save the rate payer from exploitation at the hands of petitioner.

Now comes petitioner and contends that the restrictions above cited contained in the original franchise were illegal and are now without force and effect in the determination of the present case. The decision of the commission in Docket No. G-575 was never appealed to the proper forum and in fact there was never a petition filed for a rehearing of said case. The petitioner now stands without merit to be heard on any such untenable contention. Section 19 (a) & (b) of the Natural Gas Act of June 21, 1938 (Title 15USC, Section 717R), (Petitioner's Brief, Pages 10 and 11) clearly sets forth the procedure that must be followed in the event any party is dissatisfied with the findings of the Federal Power Commission. Section 717R(a) sets out in part that "Any person, state, municipality, or state commission aggrieved by an order issued by the commission in a proceeding under this chapter to which such a person, state, municipality, or state commission is a party may apply for a rehearing in thirty days after the issuance of such order .... no proceeding to review any order of the commission shall be brought by any person unless such person shall have made application to the commission thereof."

Section 717R(b) in part sets out as follows: Any party to a proceeding under this chapter aggrieved by an order issued by the commission in such proceeding may obtain a review of such order in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the order of the commission upon the application for a rehearing, a written petition praying that the order of the commission be modified or set aside in whole or in part.

It is apparent from the above that within a period of sixty days after the issuance of the order in Docket No. 6-575 all matters contained therein were concluded and the petitioner is now legally estopped from in a collateral manner attempting to attack said order and attempting to use that method of substantiating petitioner's contentions in this cause. Petitioner cannot now be heard, and comes too late to avail himself of rights to which it was entitled some sixty days, and no more, after the final order issued in Docket No. G-575.

Petitioner further contends that a 3.2% rate of return is not a "fair rate of return" and does not provide for "just and reasonable rates" as provided by the Nashville Gas Act. Again petitioner cannot be heard to complain of what it considers a fair rate of return as the specific rate of return now complained of was brought on by the complete lack of managerial prudence which has been enumerated above. Having placed itself in this position this Court is not the proper forum for a plea of mercy, but the directors of the dual corporate entities could very well afford the relief sought by simple merger and thereby serve all parties in a more reasonable, economic, efficient and prudent manner.

CONCLUSION

It is therefore contended by this intervenor that the order of the Federal Power Commission adopted and issued April 16, 1954 should be sustained in every respect and the petition to review filed on behalf of petitioner should be henceforth dismissed.

Respectfully submitted,

BENSON TRIMBLE,
Special Counsel,
City of Nashville,
537 Third National Bank Bldg.